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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

Relevant Docket Entries

1971

Jan. 12—INDICTMENT, filed.

Jan. 12—Order for warrants to issue.

Jan. 13—Order directing defendant Anderson be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Anderson in sum of $5000.00, filed.

Jan. 13—Order directing defendant Browning be released provided he execute a bond in the sum of $5,000.00, etc., and case continued.

Jan. 13—Bond executed by defendant Browning in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Hager be released provided he execute a bond in the sum of $5,000.00, etc. and case continued

Jan. 13—Bond executed by defendant Hager in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Smith be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Smith in sum of $5,000.00, filed.

Jan. 13—Order directing defendant Tomblin be released provided he execute a bond in the sum of $5,000.00, etc. and case continued.

Jan. 13—Bond executed by defendant Tomblin in sum of $5,000.00, filed.

Jan. 14—Order continuing arraignment of defendant Anderson to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Browning to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Hager to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Smith to January 27, 1971.

Jan. 14—Order continuing arraignment of defendant Tomblin to January 27, 1971.

Criminal No. 9520—Page 2

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Anderson, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Browning, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Hager, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Smith, filed.

Jan. 27—Waiver of right to be present at hearings on motions prior to trial, executed by defendant Tomblin, filed.

Jan. 27—Order as to defendant Anderson's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Browning's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Hager's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Smith's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Jan. 27—Order as to defendant Tomblin's motions to be filed on or before Feb. 15, 1971 and Govt. to file its response on or before Feb. 25, 1971; Bond amended to permit Deft. to travel anywhere within the continental limits of the United States.

Feb. 1—Certified copy of Order transferring case to Huntington docket for further proceedings.

Feb. 2—Order docketing case upon transfer from Charleston and further proceedings to be held at Huntington.

Feb. 16—Motion to Dismiss the Indictment on behalf of all defendants, filed.

Feb. 16—Motion for Discovery and Inspection on behalf of all defendants, filed.

Feb. 16—Motion for Bill of Particulars on behalf of all defendants, filed.

Feb. 16—Motion for Preliminary Hearing on behalf of all defendants, filed.

Feb. 26—Government's Response to the Various Motions filed on Feb. 16, 1971, filed.

Criminal No. 9520—Page 3

July 26—MEMORANDUM ORDER: Denying defendants Motion to Dismiss; Motion for production denied in part; Motion for Preliminary Hearing, denied; Motion for Bill of Particulars denied; and case set for trial at Huntington on August 23, 1971 at 9:30 A.M.

Aug. 4—Motion for Full Disclosure as Provided Under the Omnibus Hearing Project on behalf of all defendants, filed.

Aug. 23—ORDER: Denying defendants Motion for Full Disclosure as Provided Under the Omnibus Hearing Project.

Aug. 30—Motion for Mistrial by Defendant, John R. Browning, filed.

Sep. 13—ORDER: Directing payment of $71.42 to The Hotel Frederick for meals provided the jury on September 13, 1971.

Sep. 13—Jury Verdict of Guilty as to defendant William N. Anderson, filed.

Sep. 13—Jury Verdict of Guilty as to defendant John R. Browning, filed.

Sep. 13—Jury Verdict of Guilty as to defendant Ernest L. "Red" Hager, filed.

Sep. 13—Jury Verdict of Guilty as to defendant W. Bernard Smith, filed.

Sep. 13—Jury Verdict of Guilty as to defendant Earl Tomblin, filed.

Sep. 13—ORDER: Deft. Anderson adjudged guilty: Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Browning adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Hager adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Smith adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue.

Sep. 13—ORDER: Deft. Tomblin adjudged guilty; Prob. Dept. to make pre-sent. investigation; Disposition or sentence deferred for 30 days; and bond to continue

Sep. 17—Motion for a New Trial on behalf of all defendants, filed.

Sep. 17—Motion for a New Trial on behalf of defendant John R. Browning, filed.

Sep. 30—MEMORANDUM ORDER: Denying joint motion of the defendants for a new trial, as well as the separate motion of the defendant John R. Browning; Judgment of conviction of each defendant affirmed as reflected by orders entered on Sep. 13, 1971; and defendants to appear before the Court in Charleston on Oct. 13, 1971 for final disposition.

Criminal No. 9520—Page 4

Oct. 5—Notice of Appeal of all defendants from the order entered on Sep. 30, 1971, denying defendants' motions for a new trial and affirming conviction, as reflected by order dated Sep. 13, 1971, filed.

Oct. 8—Statement of Appellants, Describing Portion of Transcript to be Included in the Record and Statement of Issues to be Presented on the Appeal, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Anderson: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Browning: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Hager: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Smith: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 14—JUDGMENT AND COMMITMENT as to Deft. Tomblin: 10 years pursuant to 18:4208(b), etc., and bond pending Appeal in sum of $5,000.00, filed.

Oct. 19—Notice of Appeal on behalf of all defendants from the Judgment and Commitment Order entered on October 14, 1971, filed.

Oct. 19—Statement of Appellants, Describing Portion of Transcript to be Included in the Record and Statement of Issues to be Presented on the Appeal, filed.

Nov. 18—ORDER: Granting extension of time for transmitting Record on Appeal to the Fourth Circuit Court of Appeals to and including January 17, 1972.

Nov. 19—Motion of Thomas A. Tomblin, Clerk of County Court of Logan County, for the return of Precinct Books Numbers 86 and 96, which were introduced in evidence in the trial of this case, filed.

Dec. 2—ORDER: Overruling motion of Thomas A. Tomblin, Clerk, for the return of certain official records entered into evidence in the trial of this case, etc.

1972

Jan. 14—To preparing, certifying and mailing Record on Appeal. Transcript of proceedings and exhibits to be mailed when completed.

Aug. 29—Reporter's Transcript of proceedings, Volumes 1 through VII, filed.

Sept. 5—Reporter's Transcript of proceedings, Volumes VIII, IX and X, filed.

Sept. 5—Reporter's Shorthand Notes of all proceedings, filed.

Sept. 5—To mailing Reporter's Transcript of proceedings and Exhibits to Fourth Circuit Court of Appeals at Richmond, Virginia, and copy of transmittal letter to counsel of record mailed this date.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON

No. 71-1 Ch
18 U.S.C. Section 241

UNITED STATES OF AMERICA,

v.

WILLIAM N. ANDERSON
JOHN R. BROWNING
ERNEST L. "RED" HAGER
W. BERNARD SMITH
EARL TOMBLIN

Motion to Dismiss

Comes the defendants, William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, and individually and collectively respectfully move the Court to dismiss the indictment returned against them, on the following grounds:

1. The indictment fails to describe and particularize the alleged criminal violation which is asserted as forming the basis of the indictment with sufficient definiteness and certainty to inform any defendant of the precise act or acts which it is alleged he did or performed within the context of said alleged violation. There is such vagueness and indefiniteness in the statement of alleged acts that each defendant is not so informed of the nature of the accusations as to enable him to prepare his proper defense.

2. The indictment and the allegations thereof are so vague, general and indefinite that it violates the rights guaranteed to defendants by the Fifth and Sixth Amendments to the Constitution of the United States, and is couched in such general terms and language that not only is each defendant unable to prepare his defense, but is

also unable to identify the matters charged against him with such specificity as would enable him to plead an acquittal or conviction as a bar to any other proceedings against him, based on the matters or things, or any of them, on which said indictment is based.

3. The allegations of the indictment, purporting to charge and described acts of criminality upon the part of any one or all of the defendants, are mere legal conclusions without supporting facts and do not allege an offense against, or a violation of, the laws of the United States of America, and more particularly 18 U.S.C. 241.

WHEREFORE, said defendants pray that the indictment be dismissed.

Dated this —— day of February, 1971.

..... *Of Counsel*
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..... *Of Counsel*
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..... *Of Counsel*
GREENE, KETCHUM & BAKER
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Huntington, West Virginia

[Certificate of Service omitted]

[Caption omitted]

Motion for Discovery and Inspection

The defendants, William M. [sic] Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, move the Court to order W. Warren Upton, the United States Attorney for the Southern District of West Virginia:

1. To produce and permit the defendants to inspect and copy or photograph written or recorded statements of any one of the said defendants, or co-conspirators, or copies or transcripts thereof within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may be known to the attorney for the government.

2. To produce and to permit the defendants to inspect and copy or photograph any papers, documents, tangible objects, official records or documents pertaining to the primary election held within Logan County, West Virginia, on the 12th day of May, 1970, including, but not limited to, ballots, voting records, election slates, poll slips, list of voters and other pertinent records in relation to the said primary election, which are in the possession or under the control of the government.

3. To produce and to permit the defendants to inspect and copy or photograph the record and minutes of the grand jury, which returned the indictment, including grand jury testimony.

4. To produce and permit the defendants to inspect and copy or photograph any statements, records, documents, papers, tangible objects, or copies or portions thereof which are in the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government, which would tend to exculpate, ab-

solve or exonerate any one of the defendants or which are material to any one of the defendants in the preparation of their defense.

/s/ ———— *Of Counsel*
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/s/ ———— *Of Counsel*
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[Certificate of Service omitted]

[Caption omitted]

Motion for Bill of Particulars

Comes defendants, William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin, and respectfully move the Court to require the United States Attorney to furnish said defendants with a bill of particulars stating the following information:

1. With respect to numbered paragraph 9 of the indictment, a specific statement as to when, where and by what specific acts, utterances or deeds, involving what persons,

if any, in addition to those named in that paragraph, and in what context or connection, between the dates of May 1, 1970, and January 12, 1971, were the acts upon which the allegation of willful, knowing and unlawful conspiracy to injure and oppress qualified voters at the 1970 Primary Election, claimed to have been done, committed or performed.

2. With respect to numbered paragraph 9 of the indictment, when, where, and by what means was the claimed conspiratorial act involving injuring and oppressing qualified voters in the free exercise and enjoyment of certain rights and privileges secured to them by the constitution and laws of the United States, and particularly the right of suffrage, done committed or performed.

3. Where, when and by what means did each of the defendants herein violate the laws of West Virginia and the United States, and what specific act or acts did each of the said defendants or any of them violate?

4. Where, when and by way [sic] means did any of the defendants herein named do or cause to be done, any act or acts in causing a voter to cast a ballot in violation of the laws of West Virginia and the United States? State the name of the person or persons who cast such fraudulent and fictitious votes, and state in what particular the vote was fraudulent or in what particular the vote was fictitious.

5. List the time, place and persons present when the alleged conspiracy was formed, including those persons not indicted but who were co-conspirators known to the grand jury, and state, in detail, the part each of the defendants and the so-called co-conspirators took in said conspiracy.

6. Give the names and addresses of those persons who were injured and prevented from exercising their right to have their votes cast, and state how each of the defendants named herein participated in this and how each of said defendants participated in impairing, lessening, diminish-

ing, diluting and destroying the value of or effecting the votes legally, properly and honestly cast.

7. State what acts each or any of the defendants performed that caused illegal, fraudulent and fictitious ballots to be counted, returned and certified as a part of the total votes cast in the Primary Election.

8. State which Primary Election the indictment has reference to, and state what candidates for what federal offices were the victims of the alleged conspiratorial act or acts.

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[Certificate of Service Omitted]

[Caption Omitted]

Motion for Preliminary Hearing

Defendants, pursuant to the provisions and rights bestowed on them by Rule 5(c) of the Federal Rules of Criminal Procedure, move the Court to direct that they have a preliminary hearing to protect their rights under the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

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[Certificate of Service Omitted]

[Caption Omitted]

Government's Response to the Various Motions Filed

Comes now the United States of America by Robert B. King, Assistant United States Attorney for the Southern District of West Virginia, in response to the various motions filed by the defendants and states as follows:

I. Motion to Dismiss

The indictment in this matter was drafted pursuant to the Federal Rules of Criminal Procedure, charges all necessary elements for an offense under Title 18, United States Code, Section 241, is sufficient in all respects, and is not subject to challenge by the defendants.

II. Motion for Discovery and Inspection

1. The Government is not in possession of any written or recorded statements made by any of the defendants and accordingly none can be furnished to the defendants. The Government would resist providing the defendants with statements made by any unnamed co-conspirators in this matter, except as provided under the Jencks Act, Title 18, United States Code, Section 3500, and submits that the efforts of the defendants to secure such statements is an attempt to secure names of prospective witnesses, which attempt the Government resists most vigorously.

2. The official file of the Circuit Court of Logan County pertaining to an election contest, styled *Skaggs* v. *Hager*, No. 5454, was subpoenaed by the Grand Jury investigating the matters involved in this case and is presently in possession of that Grand Jury. The Government has no objection to the defendants inspecting or copying the contents of that file so long as the integrity and secrecy of the Grand Jury proceedings in this matter are protected by an appropriate court order.

3. The Government resists the production to the defendants of Grand Jury testimony relative to this matter

except insofar as it may fall within the purview of the Jencks Act, Title 18, United States Code, Section 3500.

4. The Government is aware of its duty under *Brady* v. *Maryland* and at this time is not aware of any exculpatory material contained in the Government's file. However, if the Government should discover in the future any exculpatory evidence, either in its file or by further investigation, it will be turned over to counsel for the defendants.

III. Motion for Preliminary Hearing

The defendants are not entitled to a preliminary hearing in this matter. This indictment was returned by a Grand Jury of this Court, bench warrants were properly issued upon it, and the defendants were not arrested until this indictment was returned. This indictment constitutes probable cause and calls for a trial on the merits of this case.

IV. Motion for Bill of Particulars

Although the Government is willing to provide the defendants with more details concerning the Government's case, the Government calls upon the defendants to frame their inquiries in such form that they may be answered without calling upon the Government to divulge its entire case, along with a list of its proposed witnesses. The defendants' present request for a Bill of Particulars is drawn in such a manner as to constitute a "fishing expedition" by the defendants and the Government would not be comfortable with any answers it might provide without opening its entire file in this matter to the defendants. It is not the duty of the Government, under the law, to do this, and the Court should not require that the Government turn its file over to the defendants as a result of this broad and all encompassing request for a Bill of Particulars.

Original Signed by Robert B. King

Robert B. King
Assistant U. S. Attorney

[Certificate of Service Omitted]

[Caption Omitted]

Memorandum Order

The defendants herein have moved the Court to dismiss this indictment on the grounds that it fails to describe and particularize the alleged criminal violation asserted as a basis for the indictment and that it fails to delineate the alleged offense with sufficient specificity and particularity as would enable the defendants to plead an acquittal or conviction as a bar to any future proceedings based upon the same activity. On consideration of the motion in the light of the memoranda filed, the Court is of the opinion that the indictment meets the requirements of the Federal Rules of Criminal Procedure, adequately charges the defendants with the offense under Title 18 U.S.C. Section 241, and accordingly IT IS ORDERED that the motion to dismiss the indictment be and the same is hereby denied.

The defendants have moved that the Government be required to produce certain material for their inspection. In its response the Government states that it is not in possession of any written or recorded statements made by any of the defendants. The Government declines to furnish statements of any unnamed co-conspirators and also resists production of the grand jury testimony requested by the defendants. The Court is of the opinion that the defendants are not entitled to the statements sought nor have they demonstrated any particularized need which would require that the grand jury testimony be furnished to them except insofar as it might fall within the ambit of 18 U.S.C. Section 3500. Accordingly IT IS ORDERED that the motion for production be and the same is hereby denied with the exception that the defendants may inspect the file of the Circuit Court of Logan County in the case of *Skaggs* v. *Hager*, No. 5454, presently in the file of the grand jury of this Court.

The defendants have also moved for a preliminary hearing, but since it appears that the indictment itself consti-

tutes probable cause in this case, IT IS ORDERED that this motion be denied.

The defendants have also moved for a bill of particulars, and upon consideration thereof, the Court is of the opinion that the information sought thereby would require that the Government disclose to the defendants the details, witnesses and minutiae of the Government's case against the defendants. The circumstances of this case do not require nor justify such a disclosure on the part of the Government, and accordingly IT IS ORDERED that the motion for a bill of particulars be and the same is hereby denied.

IT IS FURTHER ORDERED that this case be set for trial at Huntington on August 23, 1971, at 9:30 a.m.

The Clerk is directed to send a certified copy of this order to counsel of record as well as to each of the defendants.

Enter: July 26, 1971.
(Signature illegible)
District Judge

(Caption Omitted)

Motion for Full Disclosure as Provided Under the Omnibus Hearing Project

Counsel for the defendants represents to the Court that they have earnestly and diligently attempted to determine what the defendants did, or failed to do, that violated the Civil Rights Act, as set forth in the said indictment in the above-styled case, and counsel further represents to the Court that the indictment is so vague and indefinite that it is impossible adequately to prepare a defense or properly advise their clients.

Counsel for the defendants jointly and severally move the Court to set a pre-trial conference for the purpose of:

1. Requiring the government to furnish opposing counsel all documents and exhibits expected to be used in the said trial.

2. Requiring the government to furnish a list of anticipated witnesses expected to be used, together with a sentence summary of their testimony.

3. The defendants agree to furnish the government attorneys copies of documents and exhibits expected to be used in the said trial.

4. The defendants agree to furnish the government a list of anticipated witnesses expected to be used, together with a sentence summary of their testimony.

Counsel for the defendants further represent to the Court that this motion is not made for the purpose of delay of the said trial, but is for the sole purpose of being able to properly represent their clients on the date set for trial.

WILLIAM N. ANDERSON,
JOHN R. BROWNING,
ERNEST L. "RED" HAGER,
W. BERNARD SMITH, and
EARL TOMBLIN,
Defendants.

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By .....

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By .....

[Caption Omitted]

Order

On the 2nd day of August, 1971, counsel for defendants filed a Motion for Full Disclosure as Provided Under the Omnibus Hearing Project.

And after mature consideration of this motion, the Court is of the opinion that the motion should be denied, as explained in the Court's letter to counsel, dated August 19, 1971. In accord therewith, it is ORDERED that the said motion be, and the same is hereby, denied.

Enter:

.....
United States District Judge

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Government's Opening Statement

[4] This case, as you may already know from having the indictment read to you, involves an election. The statute which is involved in the indictment, which the indictment charges these defendants with violating, is a statute which makes it a federal crime to conspire to violate the civil rights of citizens of the United States, one of the rights being, of course, to vote, to have your vote counted honestly and given its full effect.

That right is protected under the particular statute involved and that is what this indictment pertains to. It charges these defendants with violating the civil rights of the citizens of Logan County who cast ballots in the primary election in May of 1970, who actually did cast ballots. It charges them with violating their rights in that the indictment charges that those votes honestly cast were diluted by false and fictitious votes and ballots which were also cast, which were thrown into the pot with them.

The reason I tried to explain that, it may not be [5] very clear. This isn't a case of buying votes. The indictment doesn't charge that any votes were bought. It charges false and fictitious votes were cast or caused to be cast by these defendants and caused to be counted by these defendants. It is more in the nature of a stuffing the ballot box situation. I think it could be characterized not as buying the election; more like stealing the election.

As I said, it charges these defendants with causing the fictitious and phony votes to be cast. It charges them with having them counted, and there will be evidence on the part of the government that they were cast on behalf of these defendants and that they were counted through a long and involved process that actually involved an election contest, a trial, so to speak, a proceeding in Logan County before the County Court of Logan County, an election contest involving two particular candidates who were on the ballot in that election, two democratic candidates for the County Court.

One was a man by the name of Okey Hager, who I believe the evidence will show was the father of one of these defendants. The other was a man by the name of Neal Scaggs, and those two men were involved in this election contest and the evidence will show that they fought this thing through the election contest as to whether or not the votes cast in the [6] Mount Gay precinct, which is the precinct that basically this indictment deals with, as to whether or not the votes in the Mount Gay precinct should be counted, as to whether or not there were so many false votes that the whole precinct should have been thrown out.

The reason for the contest, the evidence will show, was that the result of that County Court race in Logan County turned on whether or not the votes in this particular precinct were to be counted. In other words, if you counted them, I believe Mr. Hager was going to win. If you didn't count them, then Mr. Scaggs was going to win.

I believe the evidence will show, frankly, that that election contest was full of perjurious testimony, full of lies. Some of it, the evidence will show, was solicited and caused by these defendants. The evidence will also show, I am confident, that Mr. Scaggs was the winner in the election, in other words, if the Mount Gay precinct was thrown out.

MR. BAER: If the Court please, this is a complete misstatement.

THE COURT: All right, gentlmen. The jury will disregard that. Let me point out to the jury that the opening statement of counsel is not evidence in the case but they merely are outlining what they think that they will introduce into [7] evidence. However, the jury should disregard the last statement of Mr. King.

MR. KING: I apologize, your Honor, and to the jury. As his Honor says, what I say is not evidence for you to consider. The evidence will come to you through the witnesses that appear here on the witness stand, but in any event this election contest went all the way to the Supreme Court of West Virginia before it was resolved, and it was resolved by the votes over in Mount Gay being duly certified and being counted.

I believe our evidence will show you that at the time of the May 12th primary election at Mount Gay there were 541 registered voters in the Mount Gay precinct in Logan County. The officially certified result, tabulation of votes cast in that precinct, reflected I believe that 401 of the 541 registered voters cast ballots on that date.

We will, I submit to you, show you by our evidence that the 401 figure is fraudulent, fictitious, and that it was a physical impossibility once you hear the evidence, and it may be long and meticulous evidence, but we submit we will show you that the 401 figure was fraudulent, that there weren't that many people voted at that precinct on that

day. In fact, as I mentioned before, that precinct, at least in one contest, at least in one of the areas, the County Court race, changed the [8] result of the election.

We, of course, don't contend that those were the only offices that the fictitious votes were cast for. There were federal candidates and candidates for other offices who were also on the ballot, but as I said, our evidence will demonstrate to you, or attempt to demonstrate to you, that these defendants had the votes cast, they had the poll slips destroyed so that the records wouldn't show who had actually voted, and that they, through the long drawn out process that I have described, had the votes counted.

The government will have some witnesses in here who testified over there in that election contest. Some of them testified on behalf of the defendants and some of them are going to tell a different story in this courtroom than they told over in Logan County. Some of them are going to tell you what happened.

MR. GREENE: I object. They did not testify in favor of the defendants.

THE COURT: Again we will just have to wait and see, Mr. Greene. The jury has been admonished that what these gentlemen say is not evidence in the case.

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[337] **Calvin Napier**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[343] Q. Did Mr. Tomblin come to your home? A. He came to my home, yes, sir.

Q. Was he alone? A. The first time I believe he was alone. Nobody was with him, and he came in and we discussed it.

Q. What did you discuss? A. Well, we discussed about me working in the house at Mount Gay and if I was going to work in the house at Mount Gay.

Q. What else did you discuss? A. Well, he told me that they pretty well had the house set up and wanted to know if I would go along with what they wanted to do, and I told him I had to study it over.

Q. Did you have any further conversation with him there that day? A. No. Well, yes. We talked about my marital troubles.

Q. Your what? A. My wife and I, we were having troubles, and we talked about that. He said he could probably help me out with that.

Q. Did he explain to you how he could help you out? A. Well, he said he would go to the judge, he told me, talk to the judge about it.

Q. Did you discuss anything else with him there? A. No, not at that time we didn't discuss anything like [344] that.

Q. You say a week before the election? A. Right.

Q. How long was Mr. Tomblin at your house? A. Ten minutes, maybe fifteen minutes.

Q. You say you told him that you were going to study it over? A. Right.

Q. Did you make arrangements to meet him again? A. He came to my house, it was either Thursday or Friday before the election, and he came up there and he had Bob Davis with him, a deputy, and Bob stayed out in the car when he came in.

Q. Who else was at your home? Anybody? A. Nobody that I recall.

Q. What happened on that occasion? A. Well, we discussed the election and he asked me what I would take to go along with the democrats in the house, that the house was set up, and wanted to know what I would take.

Q. What did you tell him? A. I told him I would take $300, and he give me two $50 bills.

Q. Did you say Mr. Tomblin said they had the house pretty [345] well set up? A. Yes, sir. He told me who all was going to work in it.

Q. What did that mean to you, having the house set up? A. Well, he had everything set up to where they could do anything they wanted to do in the house.

Q. You say he told you who was going to work in it? A. Yes.

Q. Who did he tell you was going to work in it? A. Cecil Elswick as a republican commissioner, Mae Stollings as a democrat commissioner, Minerva Richards as democrat commissioner and Janet Sullins as a democrat clerk.

Q. You say Elswick was a republican commissioner? A. Yes, sir.

Q. Had he been republican commissioner before? A. No, sir. He had always been a democrat till he changed over and come in the house as a republican election official.

Q. Did you discuss that matter with Mr. Tomblin? A. No, sir, I don't believe I did.

Q. You say he gave you two $50 bills? A. Yes, sir.

Q. And you say you had asked for 300? A. Yes, sir. He give me $200 when I arrived at the [346] polls on Tuesday morning, May 12th. He was standing there with Oval Damron, the Prosecuting Attorney, and took me beside the building and give me $200 in new dollar bills in $100 packages.

Q. Getting back to Friday when you discussed the money and he gave you the two $50 bills, did you discuss your marital problems with your wife that day? A. Yes, we did, and he also told me, reminded me again that he had—that they had the prosecuting attorney and the judgeship and he would go with me and talk to them about my marital troubles.

Q. What kind of troubles were these you were going to talk about? Were there papers outstanding? A. There was papers outstanding for me, to be served on me for separate maintenance, and he said he had the papers in

his pocket. He showed me some type of papers. I didn't read it but I took them for granted.

Q. Were they served on you? A. They were served on me after the election.

Q. Did you discuss any other matters on that Friday? A. I was out of a job and he told me he would help me get a job at the Board of Education.

Q. Did Mr. Tomblin know you were a republican? A. Yes, sir.

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[357] A. Well, you could hear the voting machine bell ring on it. Whenever you vote a machine, on your voting machines, you close the curtain, you vote the machine, and then you open the curtains, you bring the lever back and it makes a tone of a bell ringing. Just one bell. Not continuous bells. Just one bell.

Q. Could you hear that bell from where you were seated? A. Yes, you could hear it very distinctly.

Q. And you say you heard it when there weren't any voters? A. Yes, when there wasn't any voters in there.

Q. Who was at the voting machine when this happened, if you know? A. Mae Stollings and Cecil Elswick.

Q. How many times did this happen, sir, to the best of your recollection? A. Well, it happened in the morning. I couldn't give you no definite figure how many times it happened during the day, but it happened during the day, at morning, noon and evening.

Q. Mr. Napier, do you have any idea how many people actually voted there that day?

MR. BAER: Objection, your Honor.

THE COURT: On what ground, Mr. Baer?

[358] MR. BAER: Unless it is shown that he kept some sort of count himself on it. I do not feel it is proper for this man to give an estimate.

THE COURT: I think he could back it up. Overruled.

A. Well, I would say they was right around 275; right around 275.

Q. Were you there, Mr. Napier, when the polls closed? A. Yes, sir.

Q. Was that at 7:30? A. At 7:30.

Q. Were you there when the voting machines were opened or the tabulations were taken? A. Yes, sir.

Q. Do you recall how many votes were recorded on those machines? A. They were 401 all told.

Q. Do you recall how many were on each of the two machines? You said there were two machines. A. It seems to me the machine was broke down had around thirty-two votes on it. It was in the thirties. I am pretty sure it was thirty-two.

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[366] Q. All right, sir. How did this meeting happen to take place? How were you notified to come in? A. Ersel Stollings called me by telephone and said they was a meeting down there and we went down. I went down, and the rest of the election officers was there.

Q. Was this in the day or night? A. It was in the evening.

Q. In the evening. What do you mean by the evening? A. Well, around 6 o'clock, 7 o'clock something in that vicinity.

Q. And where did this meeting take place? A. In the conference room at the sheriff's office.

Q. Which is where, sir? A. From Mr. Tomblin's office it was direct to the right of it.

Q. In the Courthouse? A. In the Courthouse, yes.

Q. Who was there besides you and Mr. Tomblin and [367] Mr. Hager, you have mentioned. A. Cecil Elswick, Janet Sullins, Minerva Richards and Mae Stollings.

Q. And what happened at that meeting, sir? A. Well, it was discussed that we were told by Mr. Tomblin and Mr. Hager that—

Mr. Greene: I object to the hearsay testimony, your Honor, as to Mr. Hager. I don't know who he is.

The Witness: Mr. Ernest Hager.

MR. GREENE: Oh, I see. All right.

THE COURT: All right.

A. That we all would have to stick together, and if we stick together there could nothing be done.

Q. Stick together about what, sir? A. About what our statements would be for the contest.

Q. What contest are you talking about? A. That was a contest between Neal Scaggs and Okey Hager.

Q. How were you supposed to stick together? How was this discussed? A. All of us tell the same story. All of us to tell the same story and say Garrett Sullins had voted.

THE COURT: Say what, sir?

[368] THE WITNESS: To say that Garrett Sullins had voted at 2:30 in the afternoon that day or approximately 2:30 in the afternoon, that he had slipped out of the hospital and come in with a raincoat drooped over his shoulders and his head and he had voted, which the man did not vote.

Q. What else were you told by Mr. Hager and Mr. Tomblin? A. Another thing was told us, when we come up for the contest for us not to answer any questions that was contrary to what we had to say, and if a question showed up for us to look at Mr. Hager, Okey Hager, the County Court member, and he would shake his head yes or no for us to answer.

MR. BECKETT: Your Honor, it isn't clear to me who was making these statements.

THE COURT: Either Mr. Hager or Mr. Tomblin.

MR. BECKETT: Which one?

THE COURT: Who made that statement to you?

THE WITNESS: They was both talking to us during the day and I couldn't actually say, put my finger on either one of them to say one of them said it. They was both talking to us that day.

THE COURT: Either Mr. Tomblin or Mr. Hager?

THE WITNESS: Yes.

Q. Whose questions were they talking about? Did they [369] tell you whose questions you would be concerned with? A. Mr. Staker's

Q. Who is Mr. Staker? A. He was the lawyer that represented Neal Scaggs.

Q. And those are the questions that you are referring to? A. Yes, sir.

Q. What else happened at that meeting, if anything, sir A. Well, that's about all I can recall.

Q. How long did the meeting last? A. Oh, not over half an hour.

Q. Did you ask any question? A. No, sir.

Q. Were any questions asked? A. No, sir, not as far as I can remember.

Q. Did you say anything at all that you can recall? A. No, sir.

Q. After that meeting, Mr. Napier, when was the next occasion that you can recall that anything came up with regard to the election or the election contest? A. Well, it was approximately two weeks before the contest I got a telephone call to come to Logan to the sheriff's office and I went down and Cecil Elswick met me.

Q. At the sheriff's office? [370] A. At the sheriff's office, and said they had some affidavits for us to sign over at Senator Bernard Smith's office.

Q. What did you do then, sir? A. Well, Cecil Elswick and I went to Mr. Smith's office and he wasn't in and we waited out on the street for him to come by and he came by in possibly five or ten minutes after we was out there, and we went up to his office and talked about ten minutes, maybe fifteen minutes, and discussed the election and a few other things, and then this statement was produced to me to sign concerning the election.

Q. Who produced the statement? A. Mr. Smith, Senator Smith.

Mr. King: May I have a document marked, your Honor?

The Court: All right, sir.

THE CLERK: Government's Exhibit Number 19 is marked for identification.

MR. BECKETT: No objection.

MR. KING: No objection, I understand, your Honor.

THE COURT: All right.

THE CLERK: Government's Exhibit 19 admitted in evidence.

[375] Q. Was it the first day when Deputy Stollings took you to the conference room? A. Yes.

Q. What time of day was that? A. Around 9:30, somewhere along there. We hadn't been there too long.

Q. You say this was the same conference room you were in earlier? A. Yes, it was.

Q. What happened after you got to that conference room? Who spoke? A. Well, there was nobody in there when we first got there but Mr. Ernest Hager and Mr. Tomblin come in there after we was there a while and they told us what we should say about the testimony.

Q. What did they tell you? A. Briefed us what we should say about Garrett Sullins and all of us sticking together and telling the same story, and when we are asked a question if we are going to answer it or not, look at Mr. Hager of the County Court.

Q. Did they tell you what questions they would ask on that occasion? A. No. Mr. Staker would ask the questions.

[376] Q. How long were you in the conference room there that day? A. Well, we were there till 12 o'clock. Then we come back again after that and I don't know for sure what time we left that evening.

Q. Were you kept in the conference room all day? A. Yes, approximately all day.

Q. You say you think you came back the second day? A. I believe we did, yes.

Q. How about the third day? A. I know it was either two or three days, sir, that we came back.

Q. Were you ever called to testify on those first two or three days? A. No, we was not. No.

Q. Getting back to the conference room there on the first day, Mr. Napier, you say that Mr. Tomblin and Mr. Hager, Ernest Hager, told you all to stick together? A. Right.

Q. Did they explain what they meant by sticking together? A. Well—

MR. BAER: If the Court please, I wish to object to the leading nature of this interrogation. He can ask questions [377] without leading him as to who told what and the nature of it.

THE COURT: He stated on two or three occasions he had already said stick together, and he is going to explain what he means by that.

MR. BECKETT: Not explain what his interpretation was but what they said, what was said to this witness.

MR. KING: That's what I asked him, your Honor.

MR. BAER: No, it wasn't.

THE COURT: Confine it to what they told you in that regard.

THE WITNESS: How do you mean, sir?

THE COURT: Ask the question.

MR. KING: I will ask the court reporter to read the question.

MR. BECKETT: Just go ahead.

Q. What did Mr. Hager and Mr. Tomlin tell you with regard to sticking together? A. Well, they told us if we stuck together and we all told the same story, that nothing could be done.

Q. Did they tell you what the story was to be? A. Well, like Garrett Sullins voting, for one thing, and if we would stick together that we could not be convicted of nothing because we had the County Court, the Judge and the [378] Prosecuting Attorney and the Sheriff.

Q. Mr. Napier, have you ever heard of a woman by the name of Essie Stollings? A. Yes, I have.

Q. How long have you known her, or do you know her? A. I just know of her. That's about it.

Q. Was her name ever brought up in these discussions at the Courthouse? A. Yes. We was out in the hall and Cecil Elswick and I were talking and Mr. Tomblin and Mr. Hager.

MR. BECKETT: May we have the time and place, your Honor?

THE COURT: Go ahead and tell them what day this took place.

THE WITNESS: Well, it was during the first of the recount.

THE COURT: The recount?

THE WITNESS: I mean the contest, not the recount. We were standing in the hall and she had already testified.

Q. In the hall of the Courthouse? A. Right outside the contest room, where they were having the contest room, and Cecil Elswick brought up getting a perjury warrant for Mrs. Stollings so the rest of the witnesses wouldn't [379] testify.

MR. KING: Mr. Beckett didn't hear your answer.

MR. BECKETT: The person who made that statement.

THE COURT: Cecil Elswick.

Q. What happened then? A. Mr. Tomblin and Mr. Hager said it was a good idea to get the warrant, and they proceeded to get the warrant and she was arrested.

Q. You say that was one of the first days when you were down there? A. Yes, it was.

Q. Do you recall what time of the day it was? A. It was right around noon.

Q. Mr. Napier, did you ever testify in that contest? A. Yes, I did.

Q. Who called you as a witness? A. Mr. Staker.

Q. Why did Mr. Staker call you as a witness?

MR. GREENE: I object, your Honor.

THE COURT: Objection sustained.

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[410] Cross-Examination

By Mr. Baer:

. . . . . .

[462] Q. How would you have stolen the votes? A. I've never stolen a vote, I'll have you to know.

Q. All you do, according to your testimony, is sit quietly by and let somebody else steal them. A. I was the receiving clerk.

Q. Will you please answer my question? I will ask you if you did just sit quietly by and let somebody else steal them. A. What was I to do?

THE COURT: Just answer the question.

Q. Didn't you? A. Yes, I did.

Q. And that's what you were paid to do? A. I was paid to keep my head turned and see nothing.

Q. Before you went in that morning to operate as a clerk of the Republican party did you not take an oath? A. Yes, sir.

Q. And doesn't that oath read as follows? Didn't you take the following oath that morning? "State of West Virginia, County of Logan—I, Calvin Napier, do solemnly swear that I will faithfully and honestly discharge my duties as clerk of election now about to be held in precinct number 86-96, in Island Creek District, County of Logan, State of West Virginia; that I will not disclose nor communicate to any person how any elector [463] voted, or how any ballot was folded, marked, printed or stamped; that I do not have any promise, agreement or understanding that I am to be appointed as deputy by any candidate to be voted for at such election; that I do not have any agreement, understanding or arrangement that I shall receive any sum of money or any portion of the salary, fees or emoluments from any office for which any candidate is to be voted for at such election, should such candidate be elected at such election or any subsequent election. So help me God." A. That was the oath we took.

Q. And you swore to that? A. Yes, sir.

Q. And this is the first thing you did when you got there, wasn't it? A. I didn't do nothing dishonest.

Q. You signed that oath the first thing you did when you got there that morning, didn't you? A. Yes, sir; before we opened the polls.

Q. Before you opened the polls everyone that was in there signed an oath that they would faithfully and honestly discharge their duties? A. Which I did.

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[486] Redirect Examination

By Mr. King:

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[488] THE COURT: Did you ever talk to Mr. Browning?

THE WITNESS: No, sir.

THE COURT: All right.

Q. Mr. Napier, I am handing you what is in evidence here as Government's Exhibit Number 2, certificate of results of the Mount Gay precinct in the primary election on May 12th. I wonder if you would look at that exhibit and tell the Court and jury how many votes Senator Byrd received as candidate for United States Senator in that precinct that day, sir. A. 342.

Q. How many did Mr. Hechler receive as a candidate for United States Congress? A. 314.

Q. How many did Lloyd Jackson receive as a candidate for State Senator? A. 280.

Q. How many did Mr. Gilliam receive as candidate for the House of Delegates? A. 232.

Q. How many did Okey Hager receive as a candidate for the County Court of Logan County? [489] A. 292.

Q. How many did Mr. Leroy Counts receive as a candidate for County Court of Logan County? A. 296.

Q. How many did Garrett Sullins receive as candidate for justice of the peace? A. 328.

Q. I believe you said earlier, but how many did Elwood Sloan receive as a candidate for constable? A. 229.

Q. Mr. Napier, do you know whether or not those names that you just read were the individuals who were on the Hager slate?

MR. BECKETT: Objection, your Honor. This witness has testified he had no knowledge of who was on it.

THE COURT: I think he did.

MR. KING: He said he didn't see the slate, your Honor.

MR. BECKETT: He said he didn't know who was on it.

THE COURT: I will sustain the objection.

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[496] **Garrett Sullins**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[501] Q. What is your wife's name, sir? A. Janet.

Q. Janet Sullins? A. Janet Sullins.

Q. Mr. Sullins, did you campaign for election? A. Yes, sir, I campaigned.

Q. When the election came around where were you, sir? A. In a hospital.

Q. What hospital? A. Holden.

Q. Holden Hospital? A. Holden Hospital.

Q. When did you go in the hospital? A. It was on—well, the election was Tuesday and I went in on Sunday night.

Q. How long did you stay in the hospital? A. Around five days.

Q. All right, sir. After you had gone in the hospital did you ever have occasion to discuss the election with Earl Tomblin? A. I discussed it with him one night. Him and Cecil Elswick come to the hospital.

Q. What night? [502] A. It was the night before the election.

Q. Would that have been Monday night? A. It would have been Monday night.

Q. Do you recall what time of the night it was that they came to the hospital? A. I would say approximately around 10:30 or 11 o'clock.

Q. Was the hospital open to visitors at that time? A. Well, they usually could come on in. It is usually open when anyone wants to come in.

Q. You say Cecil Elswick and Earl Tomblin? A. Yes, sir. They were together.

Q. How long did you talk with them that night? A. Not too long because I had just had medication and I was feeling bad, but I would say we talked no longer than ten minutes.

Q. What was your ailment? Why were you in the hospital? A. Bleeding ulcer.

Q. Do you recall what Sheriff Tomblin said to you at the hospital there that night, sir? A. Yes, sir.

Q. Tell the Court and jury. A. He asked me how Janet was, so I said, "Well, how do you mean, how she is?" He said, "Well, you know a J.P. don't [503] make any money here without business," so I said, "Well, Janet will be all right then," because I had my money in and I wanted to win it. So I went ahead and let her go along. She came up later on.

MR. BECKETT: I'm sorry. I can't hear the witness, your Honor.

THE COURT: Would you speak out a little louder?

Q. Getting back to your conversation with Sheriff Tomblin and Cecil Elswick, you say they asked you how Janet was. Did Janet hold any official position there in the county or anything? A. She was the clerk at the Mount Gay precinct.

Q. Had she already been designated to be a clerk? A. Yes, sir.

Q. What were her politics? Was she a democratic clerk or a republican? A. She was democratic clerk.

Q. Were you running on the democratic ticket? A. Democratic ticket, yes, sir.

Q. You say Sheriff Tomblin asked you how she was? A. Was she going to go along in the election.

Q. Did you ask him what he meant by that? A. Well, I didn't have to because when he said, "If the [504] J.P. wins and he doesn't have any business, he can't make any money," so I pretty well knew.

Q. What did you understand by that? A. Well, if I did get elected it wouldn't do me any good because it's like being in business. If you don't have any business, you're not going to make it.

Q. What did he ask you with regard to Janet? A. With regard to Janet?

Q. Yes. A. During the time that he was there?

Q. Yes, sir. A. He just asked me how Janet was; how was she standing.

Q. How did she stand? A. Yes. To me it meant was she going to work for the Hager faction.

Q. Going to go for whom? A. Hager.

Q. The Hager faction? A. Yes, sir.

Q. Is that what you said, sir? A. The Hager faction; yes, sir.

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[524] Q. Came to Cabwaylingo? A. Yes, sir.

Q. Was this after the contest or before the contest? A. This was after the contest was over, but he came and told her—

Q. Did he talk to you? A. No, sir, he was talking to my wife.

Q. Were you present when he was talking to your wife? A. Yes, sir.

Q. What did you hear him say to your wife? A. Well, he was just talking about that we were going to get a

subpoena to the Circuit Court in Logan and he *preferred* Calvin Napier, if he changes his story in any way, they will get him for perjury right there, so we could kind of—my wife, she could take it what he meant.

MR. BECKETT: I'm sorry, your Honor. I can't hear.

THE COURT: He said his wife could sort of take it what he meant.

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[575] **Ermal Ellis**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[597] Q. Did they tell you that you would get in any kind of trouble?

THE COURT: Wait a minute. This is Sullins and Elswick.

MR. UPTON: I'm sorry.

Q. Where did this take place? Was this while you were up in the jail or some other time? A. It was some other time.

Q. All right. Was there anything said about this at the evening that you were up at the jailhouse? A. No, sir.

Q. About whether you would get in trouble or not? A. No, sir, that was the next day.

Q. Did you have a meeting the next day with anyone? A. Well—

Q. The day you testified. A. Mr. Hager and Mr. Elswick and Elwood Sloan and his brother—I don't know his name—and they was a few more people up there.

Q. Where did this meeting take place? A. It was in the jail.

[598] Q. Did Mr. Hager say anything at that meeting? A. Yes. He said not to worry about it, we wouldn't get in

no trouble, his old man was a judge and there wouldn't be no trouble, and after that it would be all over.

Q. He said his old man was a judge? A. Yes, sir.

Q. Then did you go down and testify? A. Yes, I did.

Q. After you testified did you have occasion to have any conversation with Mr. Hager? A. No, I didn't. Was that after?

Q. After you testified at the contest. A. After I come out of the courtroom?

Q. Yes. A. I seen him in a jury room or something. I don't know what it was.

Q. Did he say anything to you? A. He said I done a good job of testifying.

Q. That was the defendant Hager, Red Hager? A. Mr. Hager, yes, sir.

Q. He said you did a good job testifying? A. Yes, sir.

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[616] **Cecil Elswick**

called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. King:

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[622] A. It was in the evening.

Q. What do you mean by the evening? A. Well, it had to be around 6, between 6 and 7 o'clock in the evening.

Q. What went on at that meeting, that first time you met with Mr. Hager? A. Well, Red Hager told me he knew I had been appointed as a republican election officer, commissioner, to serve in the house, and he wanted me to go along with them and if I didn't that he would cause me trouble.

Q. Did he tell you what he meant by going along with them? A. Go along and help win the Mount Gay precinct on election day.

Q. For whom? A. For the Okey Hager slate and Senator Byrd and Ken Hechler.

Q. Who else was on that slate, if you know? A. Charles Gilliam, House of Delegates; he was on it.

Q. Mr. Elswick, what else happened at that meeting? A. Well, he told me if I didn't go along that I had a car that was stole from me about a year before, that he was going to get me indicted, said he owned the judge in the Circuit Court [623] and he already had Earl Thompson and Tom Godby impeached, and if I didn't go along he would get me indicted through Oval Damron and the judge.

Q. What else happened? A. I said, "I'll lose my job at the State Road and everything like that."

Q. Were you working at the State Road at that time, sir? A. Yes, sir.

Q. Go ahead. What did you tell him about the State Road? A. I told him I would lose my job at the State Road if I went along because I was working for Neal Scaggs on the County Court, and he said they would work out a job, part-time deputy sheriff to start with. I said, "You can't give me that job. It would have to be Earl Tomblin," and he set up a meeting a couple of days later; him and me and Elwood met at Red's house.

Q. Who did what? A. He said he would set up this meeting down at his house for me and Earl so Earl would verify I would get the job, so me and Elwood Sloan drove down there, supposed to be there at 7 o'clock, but we had got there a little early and Earl Tomblin wasn't there so we drove on down to Okey Hager's house, Red Hager's father, because Red is pretty bad about lying, about promising things and not giving them to you.

[624] THE COURT: The jury will disregard that. Just tell what happened.

Q. At that meeting you say there was another meeting arranged with Mr. Hager and Mr. Tomblin. Is that correct? A. Yes, sir.

Q. When was it to take place? A. It took place at Red Hager's house.

Q. Was that Red Hager's house, and when with respect to the first meeting? A. Just a couple of days after the meeting that we had at the jail.

Q. I didn't hear you. A. It was a couple of days after the first meeting that we had at the jail.

Q. When did it take place with regard to time of day? A. Well, it was getting late in the evening because it was getting dark.

Q. All right, sir, and who did you say went to Mr. Hager's house with you? A. Me and Elwood Sloan. He was constable at that time.

Q. What happened when you got to Mr. Hager's house, and where is Mr. Hager's house, if you will tell the Court and jury. A. Mr. Hager's house is about two mile from where Red [625] lives down there, Chapmanville.

Q. Where is Mr. Red Hager's house? Is that where you went to first? A. Yes. Mr. Red Hager's house is up a hollow.

Q. Where? A. I forget the name of the hollow.

Q. Where? What is it close to? A. It's close to Chapmanville; about two mile from Champmanville.

Q. What happened when you got to Red Hager's? A. We got to Red Hager's house and Earl Tomblin had never showed up and we drove down to Okey Hager's house, to Chapmanville.

Q. Did you see Okey Hager? A. Yes, sir.

Q. How long were you at Okey Hager's? A. We was there about fifteen minutes.

Q. What did you do when you left Okey Hager's? A. We drove back up to Red's house and Earl was there then, and instead of us going to the house, we went out to the side of the house, the washhouse.

Q. Where? A. At the side, at the washhouse, where they have the [626] washing machines and things, and we talked about the job and Earl agreed to the job and everything, that I would get it, and I was supposed to have got it five days after the primary election.

Q. What job are you talking about? A. Deputy sheriff.

Q. Who was there? A. Me and Elwood Sloan, Earl Tomblin and Red Hager.

Q. Go ahead. A. And I had my election officer slip that I would serve as election officer then, the refusal slip whether you will serve or you won't serve, and we discussed the job and Red asked me to sign it and I give it to him to turn in.

Q. Did you sign it? A. Yes, sir, I signed and marked it that I would serve.

Q. Who did you give it to? A. Give it to Red Hager.

Q. Did anything else or any other discussions occur there at that meeting at the washhouse? A. Yes, sir. The discussion come up about the summer uniform and Red told me he would give $20 on it and Elwood said he would give $20 on it.

Q. Summer uniform for what? [627] A. For deputy sheriff uniform for me.

Q. For you? A. Yes, sir. You had to buy them.

Q. Sir? A. Yes, sir. You had to buy the summer uniforms.

Q. When were you supposed to get the deputy sheriff's job? A. Red said I would get it five days after the election, as soon as the County Court met.

Q. Was there any discussion as to what you were supposed to do in order to get this job? A. I was supposed to help win the Mount Gay precinct.

Q. Sir? A. I was supposed to help win the Mount Gay precinct.

Q. Was there any discussion as to what you were supposed to do to help win it? A. We got into that later at another meeting.

Q. Was there anything else discussed at that meeting there in the washhouse? A. Yes, sir. Red said I should quit the job up at the State Road and not go back up there.

Q. Did you do that? A. Yes, sir.

Q. How long did that meeting last, if you recall? [628] A. It lasted about I would say thirty minutes.

Q. All right, sir. What did you do after that? A. After the meeting was over?

Q. Yes. A. We drove back to Logan and I went home.

Q. Did you have any other occasions prior to the election to discuss the primary election to discuss the primary election with Mr. Hager or Mr. Tomblin? A. Well, the first time anybody discussed the election was me and Bernard Smith. He told me how to win the election. He was down in the sheriff's office in the daytime.

Q. When was this? A. That was after we had the meeting at Mr. Hager's house about the job.

Q. How long after that meeting? A. It was about maybe three or four days afterwards.

THE COURT: How long before the election was it? Do you recall?

THE WITNESS: It was around close to three weeks, I would say.

Q. Mr. Elswick, where was it, now, you saw Mr. Smith? A. At the sheriff's office when they was wondering about how to win the Mount Gay precinct and Bernard—that's the first time he told me to do away with the poll slips . . .

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[633] . . . to see me or Earl Tomblin, one, and as soon as the meeting was over we went down on the elevator and after we got through discussing the meeting and everything me and Earl drove to the Holden Hospital to see Garrett to try to get Garrett's wife to go along with illegal voting at the Mount Gay precinct.

Q. Did anything else occur at the meeting before you left to go to the hospital? A. Downstairs in the basement.

Q. Slow down and speak a little louder. A. Downstairs in the basement Elwood Sloan was worrying about getting double-crossed, Bob Davis and all of them was double-crossing him, wasn't going to back him in the election for constable, and he asked Earl and Earl assured him he was

being backed by the faction and everything, and Elwood said, "I still don't think you are all going to back me," and he promised Elwood Sloan a part-time deputy job if he lost the election.

Q. Who is he? A. Earl Tomblin, Sheriff of Logan County.

Q. You say Mr. Browning was at that meeting? A. Mr. Browning was at that meeting and when we walked outside to the door there he said, "Cecil, put them on there but don't put enough on there to get in any trouble." He meant [634] don't put all the registration book where I could get in trouble and they could catch it easy.

Q. Mr. Elswick, you say after the meeting you went to the Holden Hospital? A. Yes, sir.

Q. With whom? A. With Earl Tomblin.

Q. What did you do over there? A. We went up to the hospital and he told the nurse he was the Sheriff of Logan County and he wanted to see Garrett, and it was late, about 10 by the time we got there. She said, "Go on back and see him," and we went back to see Garrett and asked what was wrong and he said—

Q. You don't have to testify to what Garrett said. You just testify as to what Mr. Tomblin said and what went on. A. Earl Tomblin told Garrett not to worry about losing the election, that they had him slated and everything and they was for him and if he would get his wife to go along with the illegal voting he would win the Mount Gay precinct and others too, and Garrett agreed to do this, and Earl told him, "What good is the J.P. without the Sheriff to give you some business?"

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[639] Q. Speak up a little more and more slowly. A. I would go with her and we had it arranged when we got in the machine with the voter we would make sure that the voter was in the middle and we was on each side of the voter, and they would say this is the way they wanted to vote. I kept the slate over there with me and I just voted

my slate. If they wanted to vote for Neal Scaggs, we would vote them for Okey Hager unless we thought one would catch us, and if we thought they would catch us we would vote the way they wanted to vote.

Q. Mr. Elswick, did you put any illegal votes on those machines that day? A. Yes, sir, we did.

Q. How many? A. I lost count at about ninety. It was over a hundred. I lost count that evening and we put more on after I lost count, so it was over 100 votes.

Q. Who were you putting those votes on there for? A. I was putting them on there for Senator Byrd and Ken Hechler and Okey Hager slate, Leroy Counts, House of Delegates, Charles Gilliam, and all their slate.

[640] Q. Who else? A. Elwood Sloan, who was running for constable, and Garland Bertram, school board member.

Q. Who was running for J. P.? A. Garrett Sullins. Put them on there for Garrett. He carried the precinct bigger than anybody.

Q. Mr. Elswick, when during the day did you put these votes on the machine? A. Well, one machine was broke down part of the time. I think all we got on it was around thirty-two votes and we hurried up and got all the voters we had in there to vote as quick as we could and we started putting the illegal votes on. As soon as there wasn't anybody waiting to vote or anything we started putting the illegal votes on the machines.

Q. Did you put the absentee votes on it that day? A. Yes, sir.

Q. How many altogether did you put on? A. We put fifteen to start with and I think it was three John R. Browning brought later over to the precinct.

Q. Mr. Browning came over there and brought some? A. Yes. I think it was three.

Q. How was the turnout there that day? A. It rained about all day. The turnout was fair to be [641] raining.

Q. Sir? A. The turnout was fair to be raining. It rained hard all day just about.

Q. How many people actually voted there that day, if you know? A. It couldn't have been over 250, I don't think.

Q. Mr. Elswick, what time of day did the polls close? A. They closed at 7:30 that night.

Q. Were you there when the polls closed? A. Yes, sir.

Q. What happened when the polls closed, after the polls closed? Tell the Court and jury. A. Well, we closed the polls and started to get ready to go back and take the tally off the machines and Junior Gaylock, Neal Scaggs' precinct captain, wanted to come in, and we wouldn't let him in. He showed us a slip on behalf of Neal Scaggs where he could come in, which was legal for him to come in, and Mae Stollings started raising cain and threatened to go home before we got counted up and I asked if it was all right for him to come in and she said no, and we put him back outside.

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[648] A. Well, we were subpoenaed to come before the contest. Neal Scaggs subpoenaed us first.

Q. Before you were subpoenaed did anything happen? A. Yes, sir. I asked Earl and Red and them about my job and they said they couldn't give it to me because the contest was going on; it would look bad if they gave it to me then.

Q. Did you ever see the election officers before the contest started? A. Yes, sir.

Q. When? A. Well, they called all the election officials up at Earl Tomblin's office. Earl was there and Red Hager was there, and tell them, you know, to stick to their stories and things that they had told about, you know, the precinct and about the crowd milling in there, telling anybody could have got the poll slips, and things like that.

Q. Mr. Elswick, when was this? How long before the contest started was this meeting you say the precinct officers had with Mr. Tomblin and Mr. Hager? A. It wasn't too long before it started. . . .

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[654] Q. How do you know she came in there and swore she heard bells ringing? A. Okey Hager told us she heard bells ringing when I was the only one in there putting votes on the machine.

Q. What day was this? Was that the day you were in that room? A. Yes, sir; the first day.

Q. What time of day was it, if you recall? A. I don't remember what time it was.

Q. You say Mr. Hager came up there? A. Up there where they had the election officers, me and Mae Stollings and Janet Sullins and Calvin Napier.

Q. What did Mr. Hager say? A. Said she swore—

Q. Said who swore? A. Essie Stollings; this woman swore that she heard bells ringing and I was the only one in the voting place, in the voting room there, and she was standing out in the hall and she heard bells ringing and I was the only one that came out of the room.

Q. What happened then? A. I said, "Get a false swearing warrant for her for [655] swearing a lie."

Q. Who said that? A. I did, and maybe that would slow them down, and Red and them agreed that it probably would.

Q. Who was there? A. I told Red and Bob Davis and the rest of the election officers that.

Q. Who else was there when you said that, if you recall? A. Earl Tomblin was there.

Q. Was Calvin Napier? A. Calvin Napier was there, yes, sir.

Q. Did he take part in the conversation? A. Calvin Napier was going to get the warrant but Red figured it was me she swore the lie on, for me to go and get the warrant myself.

Q. Did you go get the warrant? A. Yes, sir, I did.

Q. Who did you get it from? A. Luther Ghiz.

Q. Is he a justice of the peace? A. He was then.

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[667] Q. Mr. Elswick, do you recall when the contest ended with regard to time? A. No, sir, I don't.

Q. You don't. After it was over with what did you do? A. You mean after the contest was completed and everything?

Q. Yes, sir. A. I didn't do nothing. I just asked them for the job that they had promised me.

Q. Asked who? A. Asked Earl Tomblin for the job that he and Red had promised me that night down at his house, and he said they couldn't give it to me right now, that I would have to wait, and they gave me $100 a month until they could work the job out the first of November.

Q. Who gave you $100? A. Earl Tomblin gave me $100 a month, except Red Hager gave it to me two times up in the jail.

Q. Was this cash or check? A. It was all cash.

[668] Q. Did you ever get your sheriff's job? A. I got it the first of November part-time.

Q. Prior to getting your sheriff's job did anything happen with respect to the election? A. Yes, sir. Earl and Red and Bernard and them got scared that the witnesses might talk to the federal authorities and Earl and Red had talked to the Prosecuting Attorney, Oval Damron. They told me that they talked to the Prosecuting Attorney, Oval Damron. Anyway, they got out subpoenas to call the grand jury and I was down there at the sheriff's office. I had been put on full-time at that time and the subpoenas came down. I wasn't supposed to have got them but the girl that brought them down, the secretary that brought them down, she reached them to me because Dutch Barber, who was the desk clerk, was out and I went through them and seen they were calling the election officers and I got to figuring they was calling the grand jury for the election.

So Earl Tomblin came up to the jail that evening and I got him cornered and I asked him, I said, "What's going on?" He said, "Nothing." He said, "Why?"

I said, "You have got subpoenas for everybody in the Mount Gay precinct. What's going on? I want to know."

He said, "Me and Red talked to Oval Damron, the [669] Prosecuting Attorney, and we agreed to call the grand jury." That way people that went in before the grand jury, all the election officers would have to stick to the testimony they had given down at the contest, and if they didn't they would be got for perjury and put in jail.

Q. Who told you this? A. Earl Tomblin.

Q. When did this occur? A. That was the January term of the grand jury, when it met.

Q. In January? A. I believe it was in January, yes.

Q. You say you had gone to work over there as a deputy sheriff the first of November? A. Yes, sir. I served a summons on Elwood Sloan.

Q. But had you been working from November until that time? A. Yes, sir.

Q. Mr. Elswick, did you ever talk to the FBI about this matter? A. When I found out they was calling the grand jury I called the FBI.

Q. Prior to that did you talk to the FBI? [670] A. Yes, sir.

Q. Do you recall when? A. It was before I went on the deputy force.

Q. Before the first of November? A. Yes, sir.

Q. Who did you talk to with the FBI? A. Talked to Calvin Knott and some guy called Duke or something like that.

Q. What did you tell them?

THE COURT: Wouldn't that be self-serving?

MR. KING: All right.

Q. Mr. Elswick, how long did you serve on the deputy force over there? A. I served until I come up here to appear before the grand jury.

Q. Till you came where? A. Till I came up to Charleston in Kanawha County to appear before the grand jury to give testimony.

Q. Do you remember when that was? A. No, I don't remember the date.

Q. What happened then? Did you quit? A. Yes, sir. I asked one of the girls that worked in the office if she would type up my resignation for me and I quit [671] and mailed it from up in Charleston.

Q. Who did you mail it to? A. I mailed it to Sheriff Earl Tomblin.

Q. Mr. Elswick, before you testified before the grand jury up there was there any indication given to you as to whether or not you were going to be prosecuted?

MR. BECKETT: Objection.

A. Yes, sir.

THE COURT: Overruled.

MR. BECKETT: I'm sorry. I will withdraw it.

Q. Sir? A. Yes, sir.

Q. What was that? A. At the same time I asked Earl what was going on, he told me well, they were calling the grand jury so that all the people would have to stick to their story that they had given down at the contest or entered statements and everything, and said if they changed it not only would they be prosecuted, but if I changed mine and told the government authorities the truth I would be put in jail, or if I told the authorities what happened to the poll slips.

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[684] CROSS-EXAMINATION

BY MR. BAER:

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[744] Q. On this election you took the oath as a republican commissioner, did you not? A. Yes, sir. We didn't swear, hold our hands up and swear to it. We just signed it that evening.

THE COURT: Well, you knew you were signing an oath?

THE WITNESS: Yes, sir.

Q. You had intended to sign it, didn't you? I am going to ask you if that oath doesn't say that "I, Cecil Elswick, do solemnly swear that I will support the Constitution of

the United States and Constitution of the State, and that I will faithfully and impartially discharge the duties of commissioner assigned by law," and then other statements in there. Does it not contain that? A. Yes, sir.

Q. You have taken that oath four times before this. Did you ever once in your life fulfill the oath that you took as an election official? A. There isn't an election officer in Logan County that can fulfill that oath.

THE COURT: Just answer the question.

Q. I am asking you if you ever fulfilled your oath as an election official.

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[804] **Thomas A. Tomblin**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[806] Q. I hand you now, Mr. Tomblin, what has been admitted in evidence as Government's Exhibit Number 26 and ask you if you will identify that for us, sir. A. This is an order to the court from Mr. Tomblin stating that Cecil Elswick has been appointed part-time deputy.

Q. All right, sir. What is the date of that sir? A. The date of this is November 1970.

Q. Government's Exhibit Number 26 reflects official action by the County Court of Logan County. Is that correct? A. That's their approval, where he was appointed.

Q. Who signed Government's Exhibit Number 26 on behalf of the County Court, sir? A. O. L. Hager.

Q. I hand you what has been admitted in evidence as Government's Exhibit Number 27 and ask you if you will identify that for us, sir. A. This is the standard payroll for the county where the gross salary less the deductions—where the check is written from the payroll records.

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[857] **Janet Sullins**

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Upton:

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[880] Q. Was there anybody else in there? A. There was the ones that worked in the election plus Mr. Sloan I believe was there.

Q. I'm sorry. Elwood Sloan. Did you all talk in that room? A. Yes, sir.

Q. What was the subject of your conversation that day, if you recall? A. Not to forget to say that Garrett had voted between 2 and 2:30 or 2:30 or 3, along there somewhere.

Q. Who was doing the talking? A. We all was at that time, and not forget the two names of Crosses and Copach.

Q. Did Mr. Hager ever say anything to you about this, what you have just testified? A. The only thing, after we discussed what would be said when we went downstairs, they told us not to worry, that the County Court and the Sheriff's department and Prosecuting Attorney would be behind us and nothing wouldn't come of it.

Q. And who said that? A. Earl Tomblin.

[881] Q. What if anything did Mr. Hager say? A. He said something about his father with the County Court.

THE COURT: Mrs. Sullins, tell me something. You say you got a subpoena to appear as a witness in the election contest. Mr. Staker I believe you said brought it out to you.

THE WITNESS: Yes, sir.

THE COURT: And you went down to the Courthouse in Logan the day that you were supposed to respond to the subpoena.

THE WITNESS: Yes, sir.

THE COURT: How did you happen to go to this room?

THE WITNESS: Well, we may have went in the Courthouse and been sitting there, like the courtroom, and someone mentioned going upstairs.

Q. Do you recall who mentioned that to you? A. No, sir.

MR. BECKETT: Objection, your Honor. She said they may have gone there. She didn't say someone did.

THE COURT: She doesn't recall anyway.

Q. Was there anything else discussed at this meeting you had in the Courthouse? A. That was all that I could remember, just for me not to forget about Garrett, Copach and Crosses. * * *

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[892] * * * I knew it a week, it seemed like. When Mr. Tomblin came, he came with one of his employees in his own personal car, which we had a pool table in the back room, and the man was getting the money out.

Mr. Tomblin and I were talking and he mentioned that I should be subpoenaed again and he brought the name of Calvin Napier up, that if Calvin changed his testimony from the first time that we had the trial he would be got for perjury right there on the spot. I took it for granted that was for me and my husband.

MR. BECKETT: We object to what she took for granted, your Honor, and move to strike.

THE COURT: Overruled.

Q. Go ahead. Were you through? A. While he was telling me this it did scare me in my own self and I kept talking to him and I did sell him some license.

Q. What kind of license? A. I believe they were fishing and hunting combined, if I'm not mistaken.

Q. Did I ask you to bring that record with you here today? A. Yes, sir.

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[895] Cross-Examination

By Mr. Greene:

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[920] Q. And at that time you took the oath to handle the election, did you not? A. Yes, sir.

Q. And the oath you took was, "I do solemnly swear that I will faithfully and honestly discharge my duties as clerk, so help me God." A. Yes.

Q. And that was an oath. You understood that you were to see that the election was carried on honestly and fairly. Isn't that true? A. Yes, sir.

Q. But you had no intention of doing that, did you? A. No, sir.

Q. When you got in the polls with the other officials did you discuss this with Mr. Elswick? A. Just what I told you a while ago was said.

Q. What did you say? A. That he asked me had I talked to Garrett.

Q. Talked to whom? A. Garrett; my husband.

Q. And did he say anything else to you about handling the election? A. I didn't even know how to vote people hardly • • •

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Government's Closing Statement

[1787] By Mr. King:

I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, [1788] in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes cast and got the votes counted in the long drawn-out procedure that was involved over there.

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By Mr. Upton:

[1848] You saw Cecil Elswick. I challenge you, there's a letter in this evidence that Cecil Elswick wrote. You read that letter when you go to your jury room and you determine whether Cecil Elswick was smart enough to think all this up. You read that letter of Cecil Elswick's.

And they said where's Elwood Sloan? He's in prison. We didn't bring him in here. Neither did they.

Why did they want Mount Gay? Was a constable's job that important, or was that man's father's position on the County Court that important? What does the County Court of a county do? Well, they control his budget, and they control his budget, and they control his budget (indicating), and they hire all the deputy sheriffs on the recommendation of the Sheriff, and he recommended Cecil Elswick and the County Court approved it. The County Court controls the county political power and patronage.

Did Cecil Elswick and Elwood Sloan do this to get a constable's job, or was it done to get his father elected to the County Court? Control of the county purse strings, control of political patronage, control of perpetuation in office.

Now listen to the Court's charge. The Court is going to tell you something very important in his charge and that's [1849] in regard to the joining of a conspiracy. Let's assume for the purpose of argument for a minute that the coon hunters or the coon—whatever they were, the people that watch the coons—let's assume this is all right for the purpose of argument.

Let's assume there was a meeting up there the night before the election, but listen to the Court's charge in regard to what happens if an individual joins a conspiracy after it's already started. Let's assume that Cecil Elswick and Elwood did start this conspiracy. What happens if these defendants joined in at the election contest? Listen

to the Court's charge. I think the Court will tell you if they knowingly joined in, knowing what had happened, then they are equally answerable as everybody else.

And Mr. Beckett told you about the red flag. Where were the poll slips when they opened up the bucket? Didn't that raise a red flag? There's the high Sheriff of Logan County, the chief law enforcement officer of Logan County. What happened to the red flag? It got shoved under the rug.

Look at the election contest. Cecil told you they were in and out of that jail all the time, stirring up the witnesses, getting the lie swearers, swear them on, swear them off. Did Cecil Elswick have free run of the Logan County Sheriff's office and the jail? There's the high Sheriff. [1850] There's his deputy. (Indicating) Who had control of the Sheriff's office? Cecil Elswick? He was a republican.

Did they join in at the election contest? Assuming arguendo there wasn't a meeting, the coon hunters were right. You may conclude from this evidence that they joined in at the election contest. And why would they join in the election contest? To get Elwood a constable's job? Or to get his dad elected to the County Court? The power, the patronage, the money. To get a constable's job?

And the question of power, the control of the party in Logan County. In May 1970 that man was the chairman of the Democratic Executive Committee. There's the co-chairman. There's the treasurer. That man's mother was a member of the committee. (Indicating) A deputy sheriff, Bob Davis, whose name has come up through here, he was a member of the committee, and that committee hired a lawyer, Mr. Jacobs, who came in here and he couldn't even remember who his client was, and he conducted a whole election contest over in Logan County without ever consulting anybody except Cecil and Elwood.

Funny client. And they paid him out of the coffers of the Democratic Executive Committee. Power. Control. Patronage. All for Elwood Sloan's constable job? Or all for a seat on the County Court, an opportunity to run in the [1851] general election for his father?

Br. Bernard Smith appeared at the recount and the canvass and they never could find out from his secretaries who his client was, but he was over there taking notes, kept notes, but Mr. Jacobs didn't remember whether he turned them over to him or not. He didn't know.

You will recall the testimony of Mr. Elswick, I believe it was, who said that about the time that this election contest started Elwood Sloan got himself indicted and he had little interest in the election contest. For Elwood's constable's job they had an election contest? Or was it to get his father the nomination for the County Court seat?

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Excerpts from the Charge of the District Court

[1865] This case involves an alleged conspiracy and I should instruct you briefly as to the manner in which you should view the testimony of a co-conspirator. I think Mr. Beckett in his argument went a bit too far when he said that my charge would indicate that the Court considered this tainted evidence. It is not tainted evidence but it is evidence that should be scrutinized in the fashion in which I shall tell you.

As I said, this case involves an alleged conspiracy and the government has presented as a part of its case the testimony of Calvin Napier, Janet Sullins and Cecil Elswick, each of whom I instruct you is a co-conspirator, although not named as a defendant.

In addition to these three witnesses you might, if you saw fit, also conclude from the evidence that other witnesses who have testified here either for the government

or the defense would be co-conspirators in the event you found beyond a reasonable doubt that a conspiracy in fact did exist.

[1866] You are instructed that the testimony of co-conspirators must be received with great care and caution, and if you believe the testimony of an alleged co-conspirator was false and that he was induced to testify falsely either by fear of punishment or hope of reward, you may, if you see fit, disregard that testimony in its entirety.

You are further instructed that the testimony of a co-conspirator in crime, that is, a person who actually commits or participates in the commission of a crime, is admissible in evidence, yet the evidence of a co-conspirator in crime as to matters material to the issue, that is, matters connecting the defendants with the commission of the crime as charged against them, ought to be received with great caution by the jury before you should convict on such testimony.

The indictment in this case charges in substance that beginning on or about the 1st day of May, 1970 and continuing until on or about the date of the indictment the defendants unlawfully, willfully and knowingly conspired with each other and with other persons who are both known and unknown to the grand jury, to injure and oppress the qualified voters of Logan County in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and the laws of the United States, that is, the right to vote and [1867] to have such votes cast, counted, recorded and certified at full value.

The indictment also alleges that in order to effect the objects of the conspiracy the defendants caused and attempted to cause votes to be cast in the Mount Gay precinct of Logan County by procedures and methods in violation of the laws of the State of West Virginia, all with the purpose and intent that the illegal, fraudulent and fictitious ballots would be counted, returned and certified as a part

of the total vote cast in the May 12, 1970 primary election, thereby impairing, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in that primary election in Logan County, which the indictment alleges violates Title 18 of the United States Code, Section 241.

The statute cited in the indictment provides in part that it shall be a criminal offense for two or more persons to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of the charging statute.

[1868] The indictment in this case states that the defendants caused false and fictitious votes to be cast and counted, and that casting and counting such votes violates the laws of the State of West Virginia. With regard to whether or not casting and counting false and fictitious votes or causing them to be cast and counted violates West Virginia law, you are further instructed that the laws of the State of West Virginia are violated when fictitious votes are cast and counted or caused to be cast and counted.

The government in essence contends that these defendants, along with other co-conspirators not named as defendants in the indictment, including Elwood Sloan, Cecil Elswick, Calvin Napier, Mae Stollings, Minerva Richards, Janet Sullins and perhaps others, did unlawfully, willfully and knowingly conspire together and with each other to violate the law of the United States in causing or attempting to cause votes to be cast in the Mount Gay precinct of Logan County, West Virginia in the May 1970 primary election by procedures and methods in violation of the laws of West Virginia pertaining to the handling of a precinct

by election officials, and by further causing and attempting to cause the County Court of Logan County, West Virginia, to find that no illegal votes were cast in the Mount Gay precinct by soliciting perjury and the commission of [1869] perjury in an election contest held subsequent to the May 12, 1970 primary, all with the purpose and intent that the alleged illegal and fraudulent and fictitious votes would be counted as a part of the total vote cast, resulting in an impairment, lessening and dilution of the value and effect of the votes legally and honestly cast. The government contends, of course, that all this was done in violation of Title 18, Section 241 of the United States Code, the charging statute designated in the indictment.

As I have said, the indictment charges and the government takes the position that a conspiracy existed between these five defendants and possibly other persons known and unknown to the grand jury.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. A conspiracy, in other words, is a kind of partnership in criminal purposes in which each member, once a conspiracy comes into existence, becomes the agent of every other member of the conspiracy.

The gist of the offense is a combination or agreement to disobey or to disregard the law. Mere similarity of conduct among various persons and the fact that they may have assembled together and discussed common aims and interests does not [1870] in itself necessarily establish proof of the existence of a conspiracy.

The indictment, as I have stated, charges a conspiracy among these defendants and others who were known to the grand jury but not named in the indictment, and also others who were not named in the indictment because the grand jurors did not know who they were.

An individual, a person, cannot conspire with himself and therefore you cannot find any of the defendants guilty unless you find beyond a reasonable doubt that he participated in a conspiracy as charged in the indictment with at least one other person, whether that other person was a defendant or not and whether named in the indictment or not.

You must consider the guilt or innocence of each of these defendants separately. With this qualification you may find all of the defendants guilty or all not guilty, or you may find one guilty and four others not guilty, or any two guilty and three others not guilty, or any three of the defendants guilty and the other two not guilty, or any four of the defendants guilty and the fifth not guilty, or as I have said, you may find all five not guilty in accordance with the instructions and the facts that you find.

One may become a member of a conspiracy without full [1871] knowledge of all of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. Before the jury may find that a defendant or any other person has become a member of the conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant or other person who is claimed to have been a member willfully participated in the unlawful plan and with the intent to advance or further at least one of the objects or purposes of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done, that is to say, to act or participate with a bad purpose either to disobey or to disregard the law.

And so if you find beyond a reasonable doubt that a defendant or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, he becomes a conspirator, and one who willfully joins an existing conspiracy [1872] is charged with the same responsibility as if he had been one of the originators or instigators of the plan.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of the other participants until and unless it is established, one, that a conspiracy existed, and, secondly, that he was one of its members.

However, the evidence in this case need not show that the members entered into any express or formal agreement or that they directly by words spoken or in writing stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purpose was to be accomplished.

What the evidence in the case must show, ladies and gentlemen, beyond a reasonable doubt in order to establish proof that a conspiracy existed is that the members in some way or manner or through some contrivance positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Whenever it would appear beyond a reasonable doubt [1873] from the evidence in the case that a conspiracy as defined in this charge existed, and that any defendant was one of the members thereof, then the statements thereafter knowingly made and the acts thereafter knowingly done,

by any person likewise found to be a member of the conspiracy, may be considered by you, the jury, as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in his absence and without his knowledge, provided such statements and acts were knowingly made and done during the continuance of the conspiracy, and in furtherance of one of its objects or purposes.

Otherwise, any admission or incriminatory statement made or act done by one person may not be considered as evidence against any person who was not present and did not hear the statement made.

Therefore, a statement or act of any conspirator, not in furtherance of the conspiracy, or made or done before its existence, or after its termination, may be considered only as evidence against the person making the statement or committing the act.

In applying this principle of law, if you conclude beyond a reasonable doubt that there was a conspiracy as charged in the indictment and that one or more of the defendants joined [1874] in that conspiracy with any other person or persons, whether or not named in the indictment, then any act done or statement made in furtherance of the conspiracy by any person you find to have been a member of it, may be attributed to any of the defendants who you find from the evidence beyond a reasonable doubt was a member of the conspiracy at that time.

The names of numerous individuals have arisen in this trial who you may possibly consider to be unnamed conspirators in the within indictment, and only as an example, the individual known as Elwood Sloan, or any other witness or person whose name has arisen in the presentation of the evidence in this case, may be considered by you, based upon this charge, as a possible unnamed conspirator. But you should always keep in mind that the burden of

proof rests upon the government to prove beyond a reasonable doubt that a particular person was a co-conspirator.

The Court further tells you that intent is an essential element of this offense. You are therefore charged that before you can convict the defendants, or any of them, you must believe beyond a reasonable doubt that such defendant or defendants deliberately and with knowledge conspired with others to injure certain qualified voters in the free exercise and enjoyment of their right of suffrage.

[1875] Now, it is a legal presumption that people intend the natural and probable consequences of their acts, and also that they know that the right of legally qualified persons to vote is a federally Constitutionally protected right, and consequently, if any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment.

You are instructed that an act is done knowingly if done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.

In addition, an act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

And so, ladies and gentlemen, the essential elements of this offense which must be proven in order to establish the offense charged in the indictment against these defendants is, first, that the conspiracy described in the indictment was willfully formed and was existing from on or about May 1, 1970 [1876] through the conclusion of the election contest in the month of August 1970; second, that there

were two or more members of this conspiracy; third, that the object of the conspiracy was to injure citizens of the United States in the free exercise or enjoyment of their right to vote and to have such vote or votes honestly cast and counted without being diluted by false and fictitious votes.

Your verdicts, ladies and gentlemen—and there will be five forms of verdicts—must represent the considered judgment of each juror. In order to return your verdicts it is necessary that each juror agree thereto. In other words, your verdicts must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

• • • • • • • • • • •

[1879] The fact that you have not gone to the jury room and will not participate in their deliberations in reaching a verdict does not mean you have not rendered valuable service to the Court. You have. It was comforting to know if something untoward occurred we had some bench strength on which we might call in that event. You may now be excused.

Now, gentlemen, we will note on the record that one alternate has left the courtroom and the other alternate, Miss Hinkle, just came out of the jury room, so I assume we have the twelve jurors.

Any objections or exceptions?

MR. BECKETT: Your Honor, we have a motion to make.
THE COURT: But you have no objections or exceptions?
MR. BECKETT: Except as already stated.

THE COURT: Does the government want to make any futile effort?

Mr. UPTON: No, your Honor.

THE COURT: Except this. I point out, Mr. Beckett, [1880] in addition to the matters we discussed in the requests for charges in chambers this morning, any point that you want to save, if any you want to, with respect to the charge should be stated on the record at this time. I assume you have none?

MR. BECKETT: We have no additional objections, your Honor, at this time. I understood the record this morning stated our objections.

THE COURT: But that was what I was cautioning you. You should state your objection now to get it on the record.

MR. BECKETT: The only objection Mr. Baer and I think should go on the record is those portions of the instructions that contend that the conspiracy could still exist or did exist or evidence of the conspiracy after the certification, which for the purpose of the record I believe could be stated was approximately May 27th, 1970. I think that would be saved by our motion also.

THE COURT: It probably would be. What I was trying to explain to you, those Judges down in the Court of Appeals have the effrontery to refer to all that agony we went through this morning as informal proceedings, and to save your point, and you can get mouse-trapped on it, you have to give it in open court at the conclusion of the charge.

MR. BECKETT: That particular point is the only [1881] point we wanted to save. The Court straightened out the other point.

THE COURT: Yes. How about you, Mr. Upton, or Mr. King?

MR. KING: No objection.

MR. UPTON: It is rather academic, your Honor.

THE COURT: They have another motion. Go ahead.

MR. BECKETT: Your Honor, there are two matters we would like to take up with the Court and show our objection on the record. Number one, Mr. King in his closing arguments made a statement and I wrote down, "What do the defendants say," which of course would be a direct reference by the government to the defendants' failure to take the stand.

We would move for a mistrial on that basis. I don't know how the Court could straighten it out, frankly. It would cause more emphasis if it were brought to the jury's attention probably.

MR. UPTON: Your honor, I'm not sure that was the exact quote but it was something very similar to that—

THE COURT: It was.

• • • • • • • • • •

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

WILLIAM N. ANDERSON

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

JOHN R. BROWNING

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

ERNEST L. "RED" HAGER

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

W. BERNARD SMITH

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

No. 9520

UNITED STATES OF AMERICA

v.

EARL TOMBLIN

Judgment

On this 14th day of October, 1971 came the attorney for the government and the defendant appeared in person and by Philip A. Baer, Esq. and W. Stanley James, Esq., his counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty returned by a jury on the 13th day of September, 1971, has been convicted of the offense of violation of Title 18, Section 241, United States Code, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

SUPREME COURT OF THE UNITED STATES

No. 73-436

WILLIAM N. ANDERSON, ET AL., *Petitioners,*

v.

UNITED STATES

Order Allowing Certiorari.

Filed December 10, 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

LIBRARY
SUPREME COURT, U. S.

No. 73-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.
FILED
AUG 24 19

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William N. Anderson, John R. Browning, Ernest L. "Red" Hager, W. Bernard Smith and Earl Tomblin (referred to collectively as "Petitioners") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The Opinion of the Fourth Circuit (Appendix A, *infra*, pp. 1a-27a) has not yet been officially reported.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 26, 1973 (App. A., *infra*, p. 27a). By order dated July 13, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to, and including, August 25, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alleged conspiracy to cast fraudulent votes in a state primary election for the office of County Commissioner in Logan County, West Virginia, states a federal offense under 18 U.S.C. § 241.

2. Whether an indictment under 18 U.S.C. § 241 charging violation of constitutional rights must allege state action or action under color of state law, if the right allegedly violated arises under the Fourteenth Amendment.

STATUTE INVOLVED

Section 241 of Title 18, United States Code:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

STATEMENT

Petitioners were indicted on January 12, 1971, for violation of Title 18, United States Code, Section 241. The indictment alleged that the defendants conspired to injure and oppress the residents of Logan County, West Virginia, in the exercise of their constitutional rights by causing fraudulent and fictitious votes to be cast at a primary elecetion in May 1970. (See Appendix B, *infra*).

Before trial, all defendants moved to dismiss the indictment; for discovery and inspection; for a Bill of Particulars for a preliminary hearing and for full disclosure under the Omnibus Hearing Project. Except for their motion for discovery and inspection, which was granted in part, all motions were denied.

Defendants were all state officials at the time of the alleged conspiracy and trial. William Anderson was the Clerk of the County Court of Logan County. John Browning was Clerk of the Circuit Court of that county. Earl Tomblin was the Sheriff of Logan County, and Ernest "Red" Hager was one of his deputies. W. Bernard Smith was a State Senator from the Seventh Senatorial District.

Although the defendants were officials, only two of them, Anderson and Browning, had any official duties in connection with the primary election; they were responsible for distributing election supplies, preparing election ballots, maintaining the voting records of the County, and issuing and receiving absentee ballots. The indictment did not allege, and there was no evidence whatever introduced at trial, that either

Anderson or Browning used their state offices to carry out the alleged conspiracy or that they failed to discharge their election duties properly.

At trial evidence was introduced, however, to establish that the defendants had conspired with three election officials of the Mount Gay Precinct in Logan County, West Virginia, to cast fraudulent ballots in favor of Okey L. Hager for County Commissioner of Logan County in the May 1970 Democratic primary. According to the testimony of the three election officials, they cast fraudulent ballots on behalf of persons who had not voted and marked the voter registration lists to conceal their actions. The May 1970 primary involved both state and federal offices; however, as the Fourth Circuit found, the purpose of the alleged conspiracy was not to influence the outcome of any election for federal office but "to secure the Democratic nomination of Okey Hager for County Judge". (App. A., *infra*, p. 15a)

Okey Hager won the election, and his opponent Neal Scaggs then initiated a proceeding before the County Court to have the ballots cast in the Mount Gay Precinct disregarded. The election contest, which is the procedure under West Virginia law for settling contested election cases, was unsuccessful. See *State ex rel. Hager* v. *Oakley,* W.Va. , 177 S.E. 2d 585 (1970).

After a twelve day trial, all of the defendants were found guilty of violating 18 U.S.C. § 241 and each was sentenced to a maximum sentence of ten years.

REASONS FOR GRANTING WRIT

1. Petitioners were convicted under 18 U.S.C. § 241 of conspiring to secure the Democratic nomination of Okey Hager for County Commissioner of Logan County, West Virginia, through ballot box stuffing. The Fourth Circuit's holding that 18 U.S.C. § 241 encompasses a conspiracy, without racial overtones, whose only purpose is to affect the outcome of an election for a state or local office, alters existing interpretations of § 241 and greatly expands the role of federal courts in an area traditionally reserved to the States. This interpretation presents a substantial question of federal law which should be reviewed by this Court.

(a) Petitioners were indicted under one of the so-called civil rights statutes enacted during the Reconstruction period to ensure the right of Negroes to vote. See *U.S.* v. *Williams,* 341 U.S. 70 (1951). Section 241 originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140, Ch. 114, and has, with modifications not relevant here, been part of federal criminal law for over 100 years.[1] Despite its age and origins we have found no case, except the present one, in which the statute has been held applicable to a conspiracy to affect the outcome of a purely state or local election.

We have found only two Circuit Court cases which squarely faced the issue present here. *Karem* v. *U.S.,* 121 Fed. 250 (6th Cir. 1903) and *Walker* v. *U.S.,* 93

[1] Section 6, became Section 5508, Revised Statutes of 1874-1878; Section 19 of the Criminal Code of 1909 (35 Stat. 1092); Section 51 of the United States Code, 1926 Codification, (44 Stat. 462) and finally Section 241, United States Code (62 Stat. 696).

F.2d 383 (8th Cir. 1937) *cert. den.* 303 U.S. 644 (1938). Both held that conspiracies to affect the outcome of state elections did not violate the earlier versions of Section 241.[2] See also *Steedle* v. *U.S.*, 85 F.2d 869 (3d Cir. 1936).

There is no decision of this Court directly in point, but *Ex parte Siebold,* 100 U.S. 371 (1879), suggests that the civil rights statutes, of which Section 241 is a part, were not intended to apply to state and local elections. The Court stated:

> In what we have said, it must be remembered that we are dealing only with the subject of elections of Representatives to Congress. If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts. *Id.* at 393.

See also *Fitzgerald* v. *Green,* 134 U.S. 377, (1890).

(b) The Fourth Circuit upheld the application of Section 241 to this conspiracy primarily on the authority of *U.S.* v. *Guest,* 383 U.S. 745 (1966); *U.S.* v. *Price,* 383 U.S. 787 (1966); and *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

The Fourth Circuit apparently reasoned that *Guest* and *Price* establish that 18 U.S.C. § 241 may be used

---

[2] *Karem* involved Section 5508 and *Walker* Section 51.

to punish state interference with Fourteenth Amendment rights. Among those rights is the right to equal participation by all voters in state elections, *Reynolds* v. *Sims, supra.* Therefore, the Court seems to have concluded that any conspiracy to stuff ballot boxes in which state election officials take part [3] dilutes the votes of qualified voters abridging their Fourteenth Amendment rights in violation of Section 241.

In reaching this conclusion, we believe the Fourth Circuit erred. First, by relying on *Reynolds,* it confused the question of constitutional power with that of statutory construction. We have no doubt that Congress could enact legislation to punish conspiracies designed to influence the outcome of state and local elections. The question, however, is whether Congress intended to bring such activity within the scope of Section 241. There is no evidence that it did; the authority is to the contrary.

---

[3] This Court made it clear in *Price* that "private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law" 383 U.S. at 794. In that case the state officials were a sheriff, a deputy sheriff and a patrolman. cf. *Screws* v. *U.S.,* 325 U.S. 91 (1945).

In the present case the Fourth Circuit held that the connivance of official "election managers" provided the necessary state action. Unlike law enforcement officials, West Virginia election managers have only the most tenuous relationship with the state. They are selected by the executive committee of the two political parties receiving the highest votes at the preceding general election, and the County Court, which makes the official appointment, has no authority to select any other person; § 3-1-28 W.Va. Code; *Williamson* v. *Mingo County Court,* 56 W.Va. 38, 48 S.E. 835 (1904); *State ex rel. Bullard* v. *County Court,* 141 W.Va. 675, 92 S.E.2d 452 (1956); *States ex rel. Tomblin* v. *Bivens,* 150 W.Va. 733, 149 S.E.2d 284 (1966). Their appointment lasts for one week and a single election; they receive nominal compensation; § 3-1-44 and by way of training are required to see a training film; § 3-1-46 W.Va. Code.

Second, the Court overlooked the nature of the statute involved in this case. It is a criminal statute. This Court has recognized on many occasions the need for precision and specificity in criminal statutes to avoid unconstitutional vagueness. See *U.S.* v. *Classic,* 313 U.S. 299 (1941). Recently this Court addressed the problem in *Guest* stating:

> Moreover, inclusion of Fourteenth Amendment rights within the compass of 18 U.S.C. § 241 does not render the statute unconstitutionally vague. Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to interfere with the federal rights in question is satisfied. [Citations omitted]. And the rights under the Equal Protection Clause described by this paragraph of the indictment have been so firmly and precisely established by a consistent line of decisions in this Court, [footnote omitted] that the lack of specifications of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness. 383 U.S. at 753-754.

It cannot be said that the rights under the Equal Protection Clause involving state and local elections, at least as contrasted with federal elections, have been "firmly and precisely established". Even in federal elections this Court has not held that every vote must be counted equally. The strictest tests have been set forth in *Gray* v. *Sanders,* 372 U.S. 368 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); and *Wells* v. *Rockefeller,* 394 U.S. 542 (1969). More recently, however, this Court has permitted population variations of 16

percent in state legislative districts. *Mahan* v. *Howell*, 41 U.S.L.W., 4277 (U.S. Feb. 21, 1973)

If the population in state legislative districts may vary as much as 16 percent without violating the Equal Protection Clause of the Fourteenth Amendment, the dilution of a few votes in a state or local election certainly does not violate that clause. Any application of the criminal sanctions of Section 241 in such circumstances would be unconstitutionally vague.

(c) The use of Section 241 to punish isolated irregularities by local precinct officers in the election of local officials will greatly expand the jurisdiction of the federal courts in an area traditionally reserved to the States. We doubt that U.S. attorneys throughout the United States will use this authority to police state and local elections in any general and systematic manner; they have other more important and more burdensome duties. It is peculiarly the kind of authority which lends itself to abuse—to be exercised haphazardly, often in response to political direction.

We believe that this issue, affecting sensitive federal-state relations, should be considered by this Court.

2. The indictment failed to allege that the defendants, or any of their alleged co-conspirators, acted under color of state law, or that their activities involved "state action". The *Guest* and *Price* decisions make it clear that there can be no prosecution under Section 241 for a violation of an individual's Fourteenth Amendment rights without state action. See also *U.S.* v. *Williams, supra.*

In *Price* the indictment specifically charged that the defendants were acting "under color of the laws

of Mississippi". In *Guest* the allegation that the defendants conspired to intimidate Negroes in their equal use of state facilities "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" was a sufficient allegation of state action to prevent dismissal of the indictment.

"Everything essential must be charged positively [in an indictment], and not inferentially", *U.S.* v. *Cruikshank,* 92 U.S. 542, 556 (1876). See also *U.S.* v. *Stirone,* 361 U.S. 212 (1960). The indictment in this case was deficient because it did not allege an essential element of the offense—that the defendants or their co-conspirators were acting under color of state law or that their alleged activities involved state action (see Appendix B).

This defect in the indictment and the failure of the District Court to grant defendant's motion for discovery and a Bill of Particulars substantially hindered defendants and their counsel in preparing their defense. Since the indictment alleged that each defendant was a state official and named no other co-conspirators, each reasonably believed that the conspiracy involved only the duties of the two named co-conspirators (Anderson and Browning) who had official election functions. This was not the case. The defendants also assumed that the indictment charged a conspiracy to influence the outcome of an election for federal office and prepared a defense accordingly. It was not until late in the fourth day of trial that defendants and their counsel understood what office the alleged conspiracy involved, who the unnamed co-conspirators were, and where the alleged

conspiratorial acts took place. As a practical matter, it was too late then to prepare an adequate defense.[4]

Since *Price* and *Guest* have opened Section 241 for use in connection with violations of Fourteenth Amendment rights, we submit that the sufficiency of an indictment charging such violations presents an important question in the administration of federal criminal law which this Court should review.

CONCLUSION

Because the decision below involves substantial questions of federal-state relations, we respectfully submit that this petition for a writ of certiorari should be granted.

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August 24, 1973

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[4] The indictment charged that the purpose of the conspiracy was to obtain "certification" of fraudulent votes. After "certification" and before the indictment was handed down, two of the defendants had testified in a state election contest. Over objection, the trial court permitted the government to introduce their testimony and other evidence of post-certification activities against all of the defendants.

Admission of such evidence was erroneous and contrary to this Court's holdings in *Krulewitch* v. *U.S.*, 336 U.S. 440 (1949); *Lutwak* v. *U.S.*, 344 U.S. 604 (1953); and *Grunewald* v. *U.S.*, 353 U.S. 391 (1957).

These errors have their origin in the vague indictment in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1069

UNITED STATES OF AMERICA, *Appellee,*

versus

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH and EARL TOMBLIN, *Appellants.*

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.
John A. Field, Jr., District Judge.

(Argued February 8, 1973. Decided June 26, 1973.)

Before WINTER and RUSSELL, Circuit Judges, and MURRAY, District Judge.

Philip A. Baer (Baer and Napier; Robert H. Burford and Beckett, Burford and James on brief) for Appellants;
Robert B. King, Assistant United States Attorney, (John A. Field, III, United States Attorney, on brief) for Appellee.

RUSSELL, *Circuit Judge:*

The defendants were convicted by a jury of violating Section 241, 18 U.S.C., which makes it a crime for two or more persons to conspire to injure any citizen in the free exercise or enjoyment of his federal constitutional rights. The prosecution arose out of a primary election in Logan County, West Virginia. The offense involved the alleged "stuffing" of the ballot box with illegal ballots at one of the voting precincts during such election. The defendants

have appealed. We find no error in the trial below and affirm.

I.

The defendants level their first attack against the indictment itself. According to their argument, the indictment consisted of "only legal conclusions", was "totally devoid of any allegation of fact constituting or describing the offense intending [sic] to be charged", and was defective for failure "to allege that the conspiracy related to votes for candidates for Congress and the United States Senate". Even a hasty reading of the indictment, however, demonstrates that this claim is, to use the defendants' own phrase, "totally devoid" of merit. The indictment explicitly alleged that the election was "held within the State of West Virginia for the purpose of nominating candidates for the offices of United States Senator, Representative to Congress, and various state and county public offices." [1a] It identified the election precinct where the alleged conspirators proposed to accomplish their illegal acts (*i.e.*, "the Mount Gay precinct") and described with as much particularity as the indictment in *United States* v. *Saylor* (1944) 322 U. S. 385, the wrongful acts intended to be accomplished by the conspirators in such precinct (*i.e.*, "to cause fraudulent and fictitious votes to be cast in said precinct"). The indictment thus stated an offense under Section 241 with as much precision as was required. *Fields* v. *United States* (4th Cir. 1955) 228 F. 2d 544, 545-6, *cert. denied*, 350 U. S. 982; *United States* v. *Morado* (5th Cir. 1972) 454 F. 2d 167, 169.

II.

In addition to their motion to dismiss on the ground of defective indictment, the defendants filed successive motions for a bill of particulars, for a preliminary hearing, for access to the grand jury testimony, for copies of all statements of any of the defendants in the possession of

[1a] *Cf.*, III(c) hereof, as to whether jurisdiction under Section 241 is confined to federal elections.

the Government, and finally "for full disclosure as provided under the Omnibus Hearing Project",[1] including "all documents and exhibits expected to be used in the said trial", any records or statements in the Government's files that will "tend to exculpate, absolve or exonerate any one of the defendants," and "a list of anticipated witnesses expected to be used, together with a sentence summary of their testimony." They predicated their motion "for full disclosure" on the assertion "that the indictment is so vague and indefinite that it is impossible adequately to prepare a defense or properly advise their clients", a claim which represented substantially the basis for their motion to dismiss and a claim which we have already found without merit. The defendants made no claim of "particularized need" in their other motions. In opposing the motions, the Government stated that it had in its possession no written statements of the defendants and that it had no "exculpatory material" in its files.[2] All of the motions

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[1] This motion was apparently drafted in line with Section 5.3 of the *Standards Relating to Discovery and Procedure Before Trial,* American Bar Association Project on Standards for Criminal Justice, approved August, 1970. See, Oliver, *Omnibus Pretrial Proceedings: A Review of the Experience of the United States District Court for the Western District of Missouri,* 58 F.R.D. 270 (1973).

[2] The Motion for discovery of exculpatory material rests, of course, on *Brady* v. *Maryland* (1963) 373 U.S. 83, as further explicated in *Moore* v. *Illinois* (1972) 408 U.S. 786, 794-5:

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense and (c) the materiality of the evidence."

Disclosure required under this rule exists, however, whether a motion be made or not. *Barbee* v. *Warden, Maryland Penitentiary* (4th Cir. 1964) 331 F. 2d 842, 845-6. And the Government must act in good faith in discharging this duty; if in doubt, it should submit the material in question to the court itself for *in*

were denied by the District Court. We find no error in such denials, and discuss them *seriatim.*

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camera review. For an interesting discussion of what may be deemed "exculpatory material" within the rule, *see, Ingram* v. *Peyton* (4th Cir. 1966) 367 F. 2d 933, 936; *Barbee* v. *Warden, supra,* (331 F. 2d 842); 44 F.R.D. 500-5. An assurance by the Government that it does not possess exculpatory evidence, absent a particularized showing of its existence and materiality by the defendant, will not support a reversal of a trial court's denial of an *in camera* inspection by the Court of the Government's file. *United States* v. *Crisona* (2nd Cir. 1969) 416 F. 2d 107, 116; *United States* v. *Gonzalez* (5th Cir. 1972) 466 F. 2d 1286, 1288; *United States* v. *Isaacs* (D.C. Ill. 1972) 347 F. Supp. 743, 759; *cf.,* however, Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations,* 50 *N.C.L.R.* 437, at 458. No attempt at such a showing in this case was made, though the defendants did suggest that perhaps the witness Napier had given a single negative statement in his testimony before the grand jury that could be considered exculpatory. The trial court did not find the answer exculpatory, but, if the statement was, it was made available to the defendants at trial before Napier was cross-examined. This was timely under the circumstances of this case. The Supreme Court "has never pinpointed the time at which the disclosure [*under Brady*] must be made." Nakell, *supra* (50 N.C.L. Rev. 437, 452). Disclosure should, however, be made "at a time when the disclosure would be of value to the accused" and "at least, before the taking of the accused's evidence is complete." *Hamric* v. *Bailey* (4th Cir. 1967) 386 F. 2d 390, 393. *See, also, United States* v. *Elmore* (4th Cir. 1970) 423 F. 2d 775, 779. As suggested in *Hamric,* it may well be that in a more complicated situation, where there is exculpatory evidence having "a material bearing on defense preparation", the Government should provide the defense with the exculpatory material prior to trial, otherwise the defense would not be able to "capitalize" on it. *Cf., United States* v. *Ahmad* (D.C. Pa. 1971) 53 F.R.D. 186, 193-4; *United States* v. *Cobb* (D.C.N.Y. 1967) 271 F. Supp. 159, 163 *aff'd.,* 396 F. 2d 158; *United States* v. *Gleason* (D.C.N.Y. 1967) 265 F. Supp. 880, 884-5. In this case, though, the so-called exculpatory evidence consisted of a single categorical answer. The defense could not have been prejudiced by not being afforded such bare answer prior to trial. *Cf., United States* v. *Elmore, supra,* (423 F. 2d 775).

For a general discussion of *Brady, see,* Note, *Brady* v. *Maryland and the Prosecutor's Duty to Disclose,* 40 *U. Chi.L.Rev.* 112 (1972).

(a) *Motion for a Bill of Particulars*

A motion for a bill of particulars is addressed to the sound discretion of the trial court, and, absent a showing of abuse of discretion, the ruling of the trial court will not be disturbed on appeal. *United States* v. *Dulin* (4th Cir. 1969) 410 F. 2d 363, 364; *United States* v. *Baggett* (5th Cir. 1972) 455 F. 2d 476, 477; *United States* v. *Cooper* (10th Cir. 1972) 464 F. 2d 648, 654; *United States* v. *Gray* (8th Cir. 1972) 464 F. 2d 632, 635. Ordinarily, the function of a bill of particulars is not to provide "detailed disclosure of the government's evidence in advance of trial" but to supply "any essential detail which may have been omitted from the indictment." *Dillen* v. *Wainwright* (5th Cir. 1971) 449 F. 2d 331, 332; *United States* v. *Cansler* (7th Cir. 1969) 419 F. 2d 952, 954; *Hemphill* v. *United States* (8th Cir. 1968) 392 F. 2d 45, 49, *cert. denied* 393 U. S. 877. The information sought by the defendants in their motion was the entire range of evidence on which the Government relied, including the names of all witnesses to be used by the Government. Denial of such a disclosure, "whether requested by motion for Bill of Particulars under Rule 7(f), or by a motion for discovery under Rule 16(b), Federal Rules of Criminal Procedure", will not be considered an abuse of discretion on appeal. *United States* v. *Baggett, supra* (476 F. 2d at 477). Particularly is this true where the Government, while resisting the broad scope of the motion, expresses, as it did in this case, its willingness "to provide the defendants with more details" should the defendants "frame their inquiries in such form that they may be answered without calling upon the Government to divulge its entire case." The defendants made no effort to take advantage of this offer of the Government. These circumstances in particular preclude a successful contention by the defendants that the trial court abused its discretion.

(b) *Demand for a Preliminary Hearing*

Nor can a defendant demand a preliminary hearing after indictment, which was the posture of the prosecution when the defendants moved for a preliminary hearing. Section 3060(e), 18 U.S.C.; *United States* v. *Mackey* (4th Cir. 1973) 474 F. 2d 55, 57; *United States* v. *Farries* (3d Cir. 1972) 459 F. 2d 1057, 1061, *cert. denied* — U. S. —; *United States* v. *Coley* (5th Cir. 1971) 441 F. 2d 1299, 1301; *United States* v. *Chase* (4th Cir. 1967) 372 F. 2d 453, 467, *cert. denied* 387 U. S. 907; *Braxton* v. *Peyton* (4th Cir. 1966) 365 F. 2d 563, 565, *cert. denied* 385 U. S. 939.[3] The purpose of a preliminary hearing is not to provide a discovery mechanism for the defendant, though this may be a collateral or incidental benefit from the hearing, but merely to determine "whether probable cause exists to bind an accused for action by a grand jury." *United States* v. *Chase, supra* (372 F.2d at 467); *United States* v. *Mackey, supra* (474 F. 2d at 57); *United States* v. *Brumley* (10th Cir. 1972) 466 F. 2d 911, 915; *cf., Ross* v. *Sirica* (D.C. Cir. 1967) 380 F. 2d 557.[4] After indictment, a preliminary hearing

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[3] *See, also, Jaben* v. *United States* (1965) 381 U.S. 214, 220, *reh. den.* 382 U.S. 873, where the Court said that, under Rule 5, Federal Rules of Criminal Procedure, a preliminary hearing was required, *"unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment."* (Italics added.)

[4] For a discussion of *Ross, see, United States* v. *Milano* (10th Cir. 1971) 443 F.2d 1022, 1025, *cert. denied* 404 U.S. 943:

> "Defendant relies on Blue v. United States, 119 U.S.App. D.C. 315, 342 F.2d 894 (1964), cert. denied, 380 U.S. 944, 85 S. Ct. 1029, 13 L.Ed.2d 964 (1965), and Ross v. Sirica, 127 U.S.App.D.C. 10, 380 F.2d 557 (1967), which did say that the preliminary examination also provided the defendant with discovery. But that is merely an incidental benefit—which varies widely from case to case depending on how much evidence the government produces at this early state—and not the statutory purpose. *Blue* and *Ross* have not been followed in other circuits. *Cf.* United States v. Karger, 439 F.2d 1108

"would be an empty ritual". *Barber* v. *United States* (4th *Cir.* 1944) 142 F. 2d 805, 807, *cert. denied* 322 U. S. 741; *Sciortino* v. *Zampano* (2nd Cir. 1967) 385 F. 2d 132, 133, *cert. denied* 390 U. S. 906; *United States* v. *Daras* (9th Cir. 1972) 462 F. 2d 1361, 1362, *cert. denied* — U. S. —; *Crump* v. *Anderson* (D.C. Cir. 1965) 352 F. 2d 649, 655-6; *Dillard* v. *Bomar* (6th Cir. 1965) 342 F. 2d 789, 790, *cert. denied* 382 U. S. 883; *Vincent* v. *United States* (8th Cir. 1964) 337 F. 2d 891, 896, *cert. denied* 380 U. S. 988, *reh. denied* 381 U. S. 947.[5]

(c) *Discovery of Grand Jury Testimony*

Except for his own testimony, a defendant is not entitled of right to pre-trial access to the testimony before the grand jury: The obligation of the Government is merely to make available to the defendant the testimony of a witness before the grand jury at the conclusion of the direct testimony of such witness at trial and then only if the defendant shows a "particularized need" for such disclosure.[6] This was our holding in *United States* v. *Johnson*

(1st Cir. 1971). Moreover, 18 U.S.C. § 3060 was enacted after both cases, and, we think, clarifies the statutory purpose."

This language is reiterated in *United States* v. *Brumley, supra* (466 F.2d at 915-6).

It has been suggested that if the preliminary hearing is expanded into a discovery proceeding, there is danger of a "trial before a trial," a procedure that would bog down the expedient administration of criminal courts. Note, *Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16*, 15 *Vill. L. Rev.* 655 at 678 (1970).

[5] *Cf.*, however, Nakell, Note, *supra*, at 468.

"• • • Coleman [Coleman v. Alabama, 399 U. S. 1] could be interpreted to provide a constitutional right to a preliminary hearing • • •."

But, cf. concurring opinion of Justice White in *Coleman* (399 U. S. at 17-8).

[6] For a discussion of what may constitute "particularized need", *see*, Note, *Defense Access to Grand Jury Testimony: A Right in Search of a Standard*, 1968 *Duke L. J.* 556.

(4th Cir. 1969) 419 F. 2d 56, 59, *cert. denied* 397 U. S. 1011.[7] Even where a defendant alleges a "particularized need" (which the defendants have not done in this case), the denial of access at trial will be disturbed on appeal only if the finding by the trial court against the claim of "particularized need" was clearly erroneous. *United States* v. *Bryant* (4th Cir. 1966) 364 F. 2d 598, 600; *Posey* v. *United States* (5th Cir. 1969) 416 F. 2d 545, 557, *cert. denied* — U. S. —, *reh. denied* 397 U. S. 1031. This ruling conforms with the Jencks Act, as amended in 1970, Section 3500 (c)(3), 18 U.S.C.[8] and is in line with the majority rule as

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[7] In *Johnson*, the Court said (419 F.2d at 59):

> "Johnson argues that recent decisions allow automatic access to grand jury testimony and that no longer must a defendant make a showing of particularized need for examining the grand jury's minutes. None of these decisions, however, require disclosure of all grand jury testimony as a matter of right. The Second and Seventh Circuits afford the broadest disclosure for the purposes of impeachment. There, in the absence of sound reasons for a protective order, a defendant may examine the grand jury testimony of a witness on subjects about which the witness testified at the trial."

It would seem, however, the Seventh Circuit has now adopted the view expressed in *Johnson*. See, *United States* v. *Cerone* (7th Cir. 1971) 452 F.2d 274, 287:

> "• • • Grand jury minutes are not available as of course to defendants in federal criminal trials, but rather may be made available in the exercise of the trial court's discretion when the defense has shown that 'a particularized need' exists for the minutes which outweighs the policy of secrecy [of the grand jury's proceedings]."

[8] See 1 Wright, *Federal Practice and Procedure* (1972 Supplement), § 254, at 130, n. 91:

> "As a part of the Organized Crime Control Act of 1970, the Jencks Act was amended to include in the definition of 'statement' in 18 U.S.C.A. § 3500(e) the following new provision: '(3) a statement, however taken or recorded, or a

established in the several circuits. *United States* v. *Daras* (9th Cir. 1972) 462 F. 2d 1361, 1362, *cert. denied* — U. S. —; *United States* v. *Quintana* (10th Cir. 1972) 457 F. 2d 874, 878, *cert. denied* — U. S. —; *United States* v. *Doe* (1st Cir. 1972) 455 F. 2d 1270, 1274; *United States* v. *Harflinger* (8th Cir. 1970) 436 F. 2d 928, 935, *cert. denied* 402 U. S. 973; *United States* v. *Bass* (8th Cir. 1973) 472 F. 2d 207, 210; see, also, Proposed Amended Rule 16 (VI)(3), *Federal Rules of Criminal Procedure*, 48 F.R.D., at 590.

(d) *Motion for Full Disclosure as Part of Omnibus Pre-trial Proceedings*

Finally, the defendants sought by their "motion for full disclosure" under Rule 16(b) to compel the pre-trial production by the Government of all documents to be introduced and a list of all witnesses to be used, along with a summary of their testimony.[9] While, since the 1966 amendment, courts have been more liberal in their grant of relief under Rule 16(b), the granting of relief under that Rule remains "a matter within the sound discretion of the district court" and the action of the district court, in denying such relief, "is reviewable only for an abuse of discretion." *United States* v. *Cole* (8th Cir. 1972) 453 F. 2d 902, 904; *United States* v. *Pope* (7th Cir. 1969) 409 F. 2d 371, 374. As a matter of fact, the Government asserted that all documents to be introduced by it were included in the record of the election contest, which it tendered to the defendants.

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transcription thereof, if any, made by said witness to a grand jury.' "

See, also, U. S. Code Cong. & Admn. News, 91st Cong. 2d Sess., 1970, at 4017, Pub. L. 91-452, 84 Stat. 926; *but, cf., United States* v. *Duffy* (D.C. Ill. 1972) 54 F.R.D. 549, 550.

[9] Pre-trial hearings in criminal cases have in recent years been encouraged and a number of District Courts have developed procedures for such hearings. *See*, Oliver, *Omnibus Pretrial Proceedings, supra* (58 F.R.D. 270) and Advisory Committee Note, *Proposed Amended Rule 16*, 48 F.R.D. 604.

As for the demand of the defendants for a list of the Government's witnesses, they were not entitled of right, in this non-capital case, to such pre-trial disclosure. *United States* v. *Chase, supra* (372 F. 2d at 466); *United States* v. *Elmore, supra* (423 F. 2d at 779, n. 7); *United States* v. *Harflinger, supra* (436 F. 2d at 936); *United States* v. *Wolfson* (2nd Cir. 1969) 413 F. 2d 804, 808; *United States* v. *White* (5th Cir. 1971) 450 F. 2d 264, 268, n. 6. The trial court, of course, "in its discretion may order the government to produce such a list under Rule 16, Federal Rules of Criminal Procedure." *United States* v. *Jordan* (4th Cir. 1972) 466 F. 2d 99, 101.[10] In this case, it is quite obvious why the court may well have considered inappropriate any such discretionary pre-trial order requiring the government to provide defendants with a list of its witnesses in this case. The persons involved were all powerfully-placed public officials in a small county in which all the witnesses lived. There were suggestions that already persons conversant with the facts in the case had been harassed.[11] Moreover, there had been an earlier hearing in the county court. The persons who had knowledge of the facts were well known to the defendants and in the main had testified at this election hearing. In the light of all these circumstances, it cannot be said that the trial court abused its discretion in denying to the defendants a pre-trial list of the Government's witnesses.

Nor were the defendants entitled to a summary of the testimony to be given by such witnesses. The Court in

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[10] *See, also, Will* v. *United States* (1967) 389 U. S. 90, 99; *United States* v. *Houston* (D.C.Ga. 1972) 339 F. Supp. 762, 765; Proposed Amendments to Criminal Rules, 48 F.R.D. 553, 603-4; Note, *Discovery of Witness Identity under Preliminary Proposed Federal Criminal Rule 16,* 12 W. & M.L. Rev. 603 (1971); and Orfield, *List of Witnesses and Jurors in Federal Criminal Cases,* 44 F.R.D. 527.

[11] *See* the comments of the United States Atttorney for Connecticut on this possibility of harassment as a reason for denial of a list of government witnesses in 44 F.R.D. at 499 (1968).

Sendejas v. *United States* (9th Cir. 1970) 428 F. 2d 1040, 1046, *cert. denied* — U. S. —, correctly stated the controlling rule in this connection thus:

> "There is nothing as plain as the statute [i.e., the Jencks Act] in terms of stating that no pretrial statement in the possession of the government shall be subject to subpoena, discovery or inspection until the individual witness *has testified on direct* examination in the *trial of the case* and then only after proper motion by the defendant." (Italics in the opinion.)

Actually, the trial court construed the motion of the defendants as intended to "require that the Government disclose to the defendants the details, witnesses and minutiae of the Government's case against the defendants." Taken as a whole, the motions of the defendants were what might be described as "a shotgun fishing expedition for evidence," *United States* v. *Crisona* (D.C. N.Y. 1967) 271 F. Supp. 150, 158, and as "overly broad in scope", *United States* v. *Wolfson, supra* (413 F.2d at 808). Rule 16 does not require "the prosecution to disclose all the minutia [sic] of its evidence, to reveal its trial strategy, and to delineate with total specificity the case it intends to present." *United States* v. *Fioravanti* (3d Cir. 1969) 412 F. 2d 407, 411, *cert. denied* 396 U. S. 837. Under the circumstances of this case, we find no error in the denial of such a motion.

III.

The defendants next contend that the District Court erred in the admission of the sworn testimony of the defendants Earl Tomblin and John R. Browning, taken at the state hearing on the protest filed by the defeated candidate for County Judge and involving the Mount Gay ballot box. There is, however, considerable ambivalence and vacillation of position on the part of the defendants with reference to this claim of inadmissibility in this connection. When the evidence was first proffered, the defendants ap-

parently contended that no statement by a defendant was admissible in the prosecution's case in chief because, "(T)his is a manner of in effect placing him on the witness stand by reading his testimony", violative of the defendant's constitutional "right to stand mute". Later, in the same colloquy, the defendants suggested that, since the testimony was given "in a judicial hearing", there might be *Miranda* problems. Subsequently, the defendants moved to strike the testimony, as against any defendants other than the one whose prior testimony was being proffered as evidence. It would seem that, for purposes of this motion to strike at least, the defendants were then conceding that the evidence was admissible against the defendant whose testimony at the election contest hearing was proffered but against no other defendants. On reaching this Court, however, the defendants began a new line of attack on this testimony, entirely different from any advanced in the trial below. In their brief in this Court, they argue that the testimony of Tomblin and Browning at the election contest hearing was offered for purposes of impeaching the credibility of those two defendants and that, since those defendants had exercised their constitutional right not to testify, the admission of such evidence violated their Fifth Amendment rights. Finally, during oral argument in this Court, the question arose whether the conspiracy forming the basis of the prosecution, so far as federal jurisdiction over the conduct of the defendants is concerned, ended with the certification of the nomination of the candidates for federal office, thereby making inadmissible against all other defendants any statements made by Tomblin or Browning at the subsequent election contest hearing.

Ordinarily, we would not consider grounds of objection not presented in the trial court.[12] This, it would seem,

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[12] *Nelms* v. *Laird* (4th Cir. 1971) 442 F.2d 1163, 1169, *rev'd. on other grounds*, 406 U.S. 797 (1972); *McGowan* v. *Gillenwater* (4th Cir. 1970) 429 F.2d 586, 587; *McKissick* v. *United States* (5th Cir. 1967) 379 F.2d 754, 759.

would be a particularly appropriate action in this case, where the defendants have shifted so often in their contentions. However, the rule is not applied inflexibly. Where injustice may result the Court may consider other grounds than those pressed on the trial court.[13] Exercising that discretion, we shall consider all the grounds of objection raised by the defendants.

(a) *Alleged Inadmissibility as Evidence Intended Solely for Impeachment*

As we have stated, it is the position of the defendants, raised by their brief in this Court but not before the trial court, that the sole purpose of the Government in introducing the testimony given by Tomblin and Browning at the earlier election contest was to impeach the credibility of those defendants and that the introduction of such testimony effectively and unfairly impeached the credibility of *all* the defendants. Testimony at an earlier trial, they argue, is admissible for impeachment purposes only if the defendant whose earlier testimony is to be used has testified. In support of this theory of inadmissibility, the defendants cite in their brief two Texas cases. Neither sustains their position. If anything, they uphold the admissibility of the testimony. In the first of these cases, *Scherpig* v. *State* (1929) 112 Tex. Crim. Rep. 61, 13 S.W. 2d 872, a portion of the testimony of the defendant in another trial was offered in evidence by the prosecution and admitted. Thereafter, the defendant, who did not testify, offered other parts of the testimony of the defendant. In rebuttal, the prosecution offered the complete testimony of the defendant at the earlier trial but "only for the purposes of impeaching the defendant's credibility", and the Court specifically instructed the jury that it could consider that

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[13] *Wratchford* v. *S. J. Groves & Sons Company* (4th Cir. 1969) 405 F. 2d 1061, 1063; *In re Elmore* (D.C.Cir. 1967) 382 F. 2d 125, 127.

statement solely for purposes of impeachment. The defendant excepted, contending that the statement, as admitted in evidence, could not be so limited but was "before the jury for all purposes". The Court sustained this contention of the defendant, adding (13 S.W. 2d at 873):

> "Beyond question what appellant had sworn to on a former trial of this case, if material to any issue before the court upon this trial, would be admissible testimony when offered by the state; * * * ."

It is manifest that, far from sustaining the defendants' position, this case provides no support for the contention of the defendants.

Equally inapposite is the other authority cited by the defendants, *Taylor* v. *State* (1917) 82 Tex. Crim. Rep. 210, 199 S.W. 289. There, the prosecution proffered testimony dealing with other crimes committed by the defendant, entirely unrelated to the offense for which he was then being tried. Such testimony was offered merely for purposes of impeaching the credibility of the defendant and not for purpose of establishing any circumstance or fact relevant to the pending prosecution. The defendant did not testify. The Court properly held that testimony relating to the commission of other crimes by the defendant, some of which did not even involve moral turpitude, and none of which had any factual relationship to the offense then before the Court, was inadmissible simply for impeachment purposes where the defendant did not testify; but, lest its limited ruling be misunderstood, the Court added this concluding sentence (199 S. W. at 290):

> "Of course, any incriminating testimony given by him in the other case could be proved on trial of this case and as such would be admissible."

This authority, again, when examined on its special facts, supports the admissibility of the testimony of Tomblin and Browning in the election contest.

The real difficulty with this argument of the defendants is that the testimony objected to was not proffered "for the purpose of impeaching" the two defendants by testimony having no relevance to the facts of the instant prosecution but as an admission by those defendants of facts directly related to the instant prosecution. The Government offered testimony from one Garrett Sullins that the latter was not present at the Mount Gay precinct on election day and had not voted at that precinct. Tomblin, however, had testified at the election contest hearing that he saw Garrett Sullins at the Mount Gay precinct and had observed him as he went in to vote. That testimony was given by Tomblin and the other conspirators in order to establish the alleged legality of the challenged vote of Garrett Sullins and, thus, through a finding of the legality of such vote and others like it, to secure the dismissal of the election contest. The establishment of the validity of this and other like votes was a necessary and integral part of the conspiratorial purpose, which was to secure the Democratic nomination of Okey Hager for County Judge through "stuffing" the ballot box with false votes. The record of Tomblin's prior testimony was thus not offered to impeach the credibility of Tomblin or Browning by proof of some other unrelated criminal record of Tomblin or Browning. It was offered as proof of acts done in furtherance of the very conspiracy charged. As such it was manifestly admissible. Contrary to the argument of counsel for the defendants at trial, testimony of a defendant, given at another trial or hearing, is admissible, and this is true whether the defendant elects to testify in his own defense or not, *Orth* v. *United States* (4th Cir. 1918) 252 F. 569, 570; *Edmonds* v. *United States* (D.C. Cir. 1959) 273 F. 2d 108, 112-3, *cert. denied* 362 U. S. 977; *London* v. *Patterson* (9th Cir. 1972) 463 F.2d 95, 97; *Hale v. United States* (10th Cir. 1969) 406 F. 2d 476, 478-9, *cert. denied* 395 U. S. 977, and whether he appeared as a defendant or witness, *Boitano* v. *United States* (9th Cir. 1925) 7 F. 2d 324, 325, *United States* v. *Cecil* (8th Cir. 1972) 457 F. 2d 1178, 1181.

It is of no moment whether the former trial was for the same offense or for some other, *Milton* v. *United States* (D.C. Cir. 1940) 110 F. 2d 556, 559-60, or whether the trial was a criminal or civil proceeding, *Ayres* v. *United States* (5th Cir. 1952) 193 F. 2d 739, 740-1.

(b) *Alleged Improper Admission of Such Testimony Against Co-conspirators of the Declarant*

It will be noted from the record that, when first confronted with this testimony, the defendants contested admissibility on the grounds (1) that such evidence violated the Fifth Amendment rights of the persons whose prior testimony was being used and (2) that its admission against those persons would be in contravention of the rule in *Miranda*. The first ground has already been disposed of under the principles enunciated in *Orth* v. *United States, supra* (252 F. 569). The implication that the rule announced in *Miranda* v. *Arizona* (1966) 384 U. S. 436, might inhibit the introduction of this testimony is wide of the mark. *Miranda* applies to statements procured during "custodial police interrogation" and has no application to voluntary testimony such as that involved here, given in another judicial hearing.[14] As for the contention advanced in their subsequent motion to strike, that this testimony was inadmissible against any defendant other than the particular defendant who had testified,[15] the District Court

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[14] *See, Schneckloth* v. *Bustamonte,* — U. S. —, 41 L.W. 4726, at 4733, n. 29, filed May 29, 1973.

[15] *See,* Appendix, p. 855:

"MR. GREENE: This is all right.

"Now comes the defendant John R. Browning and moves the Court to strike the evidence or the testimony of Earl Tomblin taken before the County Court and ask the jury not to consider it as any evidence as to John R. Browning.

"Your Honor, we do not have the right and opportunity to cross-examine and for many reasons it is obvious that this

apparently covered the objection in its instructions which clarified the circumstances under which the testimony could be considered by the jury against all defendants, rather than just against those making the statements—at least, the defendants did not except to the portion of the charge in which the District Court set forth the circumstances under which this testimony could be considered as against defendants other than the ones whose prior testimony in another proceeding had been admitted.[16]

At the conclusion of the District Court's charge, however, the defendants entered an exception that indirectly put in issue the admissibility of this previous testimony of Tomblin and Browning as against the other defendants. They excepted to the District Court's failure to charge that the conspiracy ended with the certification of the election results on May 27, 1970. While the request to charge made no reference to the election contest, such an instruction, if given, would have required a revision of the District Court's earlier ruling that, if the jury found that the con-

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should be stricken from the jury as far as John R. Browning is concerned.

"MR. BAER: I would like the record to show the same motion as to all defendants except the defendant Earl Tomblin."

[16] Note, immediately after admitting this testimony of Tomblin into evidence, the District Court instructed the jury as follows:

"Primarily that evidence could be considered by you only as bearing upon the guilt or innocence of Mr. Tomblin and you should view it in that perspective in the first instance. If, however, you should determine that at the time Mr. Tomblin gave this testimony in Logan County any conspiracy existed between him and any one or more of the other defendants and that you should conclude that this had any bearing on the furtherance of a conspiracy, you could then consider it as bearing upon the guilt or innocence of the other party or parties."

He restated the same instructions at the conclusion of the evidence.

spiracy continued after the election result certification and through the election contest hearing, then the testimony given by Tomblin and Browning at the election hearing was admissible against all participants in the conspiracy. Thus, by this request to charge, the defendants posed an issue that went directly to the admissibility of the challenged evidence—not as against Tomblin or Browning but as against the other defendants.

We are of opinion the District Court properly refused such request to charge and properly left standing his instructions with reference to the circumstances under which this testimony could be considered by them in determining on the guilt or innocence of the defendants other than Tomblin and Browning. The flaw in the contention of the defendants lies in the difference between means and ends. An unlawful conspiracy is presumed to continue until its objective or purpose is achieved. *United States* v. *Wechsler* (4th Cir. 1968) 392 F. 2d 344, 347-8, *cert. denied* 392 U. S. 932, *reh. denied* 393 U. S. 902; *United States* v. *Corallo* (2nd Cir. 1969) 413 F. 2d 1306, 1319-20, *cert. denied* 396 U. S. 958; *United States* v. *Carvelli* (D.C. N.Y. 1972) 340 F. Supp. 1295, 1304, *aff'd*, 464 F. 2d 1129, *cert. denied* — U. S. —. The true object and purpose of this alleged conspiracy was to secure the Democratic nomination of Okey Hager as County Judge. As a means of accomplishing this purpose, the Mount Gay ballot box was to be filled with a sufficient number of fraudulent ballots to ensure Hager's nomination. But until those fraudulent ballots were finally given effect in the election result, the end sought by the conspiracy would be unrealized and Hager's nomination insecure. Accordingly, the alleged conspiracy did not end with the certification of the result by the managers but continued through the election contest, which was to resolve whether the votes in the questioned precinct were to be given final effect in the contest for the Democratic nomination for County Judge. This seems to have been recognized by the defendants. During the trial itself, they

made, for instance, no contention that the conspiracy ended with the certification of the election returns by the box managers or that any statement given or act done by any one of the conspirators subsequent to the certification was admissible solely against the defendant making such statement or taking such action. Thus, Napier, one of the box managers, testified in great detail that certain of the defendants gathered a number of those involved in the fraudulent action at the election just before the election contest hearing and "[b]riefed us what we should say about Garrett Sullins [who had given an affidavit that he had not voted at the election, though he was recorded as having voted] and all of us sticking together and telling the same story, and when we are asked a question if we are going to answer it or not, look at Mr. Hager of the County Court." *This testimony was received against all the defendants without any objection by any defendant.* Nor in our judgment would any objection have been appropriate. Plainly, the conspiracy did not end with the certification and statements by any one of the conspirators up to and through the election hearing were admissible against all the defendants.

(c) *Inadmissibility of Evidence Based on Scope of Section 241*

During argument before this Court, the question arose for the first time whether, since the only election result challenged by the protest related to a state office, federal jurisdiction terminated when the results of the federal election were finally certified, i.e., on May 27, 1970. It is suggested that federal jurisdiction over elections under Section 241 is limited to elections in which federal offices are at stake; and, when such federal elections are finally certified, any further federal criminal jurisdiction under that statute is at an end, whatever may be the situation with reference to any state contests arising out of the election. The gravamen of this argument, then, is that since there

was no contents over the votes for federal offices at the Mount Gay box after the certification of May 27, 1971 [sic] federal jurisdiction over the conspiracy ended at that time, and evidence of subsequent events at a contest hearing involving only a state office voted on at the same election, was accordingly inadmissible. As we have stated, this involved argument arose only before this Court and was not presented to the District Court. The Government has argued that, whether the conspiracy had ended or not, the evidence was admissible under the principles enunciated in *Lutwak* v. *United States* (1953) 344 U. S. 604, *reh. denied* 345 U. S. 919. Moreover, there necessarily arises the question whether, when the defendants have attempted to use by way of cross-examination the testimony given by certain of the Government witnesses in the election contest for purposes of contradicting the testimony of those witnesses at trial, they are in any position to object to the use by the Government of testimony by certain of the defendants themselves at that election contest. We shall, however, not tarry over these points but choose to meet directly the contention that federal jurisdiction over the alleged conspiracy ended with the certification in the federal election contests and anything happening after that certification is inadmissible in a prosecution under Section 241.

The statute under which the defendants were tried is not a narrow statute. To quote the language of the Court in *United States* v. *Classic* (1941) 313 U. S. 299, 322, it "speaks neither of elections nor of primaries. In unambiguous language it protects 'any right or privilege secured by the Constitution * * * .'" *See, also, Screws* v. *United States* (1945) 325 U. S. 91, 122, n. 17 (Rutledge, J. concurring). The inclusive nature of the statute was emphasized in the recent case of *United States* v. *Guest* (1966) 383 U. S. 745, 753, where the Court said that "[w]e have made clear in *Price* [*United States* v. *Price*, 166, 383 U. S. 787] that when § 241 speaks of 'any right or privilege secured . . . by the Constitution or laws of the United States, it

means precisely that." Nor is the sweep of the statute confined to rights expressly defined in the Constitution; included among the rights "secured" thereby are those judicially determined to be fundamental and embraced by implication within the Equal Protection Clause of the Fourteenth Amendment. *United States* v. *Guest, supra,* at 755-6. Right of suffrage "is a civil right of the highest order," *Oregon* v. *Mitchell* (1970) 400 U. S. 112, 139 (Douglas, J. dissenting *and* concurring), and "a fundamental political right, because preservative of all rights", *Yick Wo* v. *Hopkins* (1886) 118 U. S. 356, 370. No right is more precious than the right of suffrage. It involves "matters close to the core of our constitutional system", *Carrington* v. *Rash* (1965) 380 U. S. 89, 96, for "(f)ree and honest elections are the very foundation of our republican form of government," *MacDougall* v. *Green* (1948) 335 U.S. 281, 288 (Douglas, J. dissenting). Truly, "(o)ther rights, even the most basic, are illusory if the right to vote is undermined", *Wesberry* v. *Sanders* (1964) 376 U. S. 1, 17. Because of these compelling considerations, the right of suffrage, whether in an election for state or federal office, is one that qualifies under the Equal Protection Clause of the Fourteenth Amendment for protection from impairment, "when such impairment resulted from dilution by a false tally, *cf., United States* v. *Classic,* 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf., United States* v. *Mosley,* 238 U. S. 383, or by a stuffing of the ballot box, *cf., Ex Parte Siebold,* 100 U. S. 371; *United States* v. *Saylor,* 322 U. S. 385." *Baker* v. *Carr* (1962) 369 U. S. 186, 208 and 247-8.[17] This was bluntly stated in

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[17] *See, also, South* v. *Peters* (1950) 339 U. S. 276, 279 (Douglas, J., dissenting):

> "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have ballot counted * * *. It also includes the right to have the vote counted at full value without dilution or discount."

Reynolds v. *Sims* (1964) 377 U. S. 533, 554-5: "[T]he Constitution of the United States protects the right of all qualified citizens to vote, *in state as well as in federal elections.* • • • The right to vote can neither be denied outright, • • • nor diluted by ballot-box stuffing • • • ." (Italics added)

While it may be that the Constitution provides the right to vote only in federal elections and that the right to vote in purely state elections must derive from state constitutions or laws (*see, Fortson* v. *Morris,* 1966, 385 U. S. 231), it is clear that, where states provide for the election of officers, that right, as we have indicated, is protected against dilution involving "state action" under the Equal Protection Clause of the Fourteenth Amendment.

In keeping with this principle, federal courts have, since *Reynolds,* consistently acted to protect the right of suffrage in elections for state legislators and administrators. *Avery* v. *Midland County* (1968) 390 U. S. 474; *Hadley* v. *Junior College District* (1970) 397 U. S. 50; *Dundee* v. *Orleans Parish Board of Supervisors of Elec.* (5th Cir. 1970) 434 F. 2d 135. *Cf., Katzenbach* v. *Morgan* (1966) 384 U. S. 641; *Carrington* v. *Rash, supra* (380 U. S. 89). It has been held that any state statute limiting the right to vote in connection with the issuance of revenue bonds to support a municipal utility system to property owners is violative of the Equal Protection Clause of the Fourteenth Amendment. *Cipriano* v. *City of Houma* (1969) 395 U. S. 701. Similarly, a state limitation of suffrage in local school elections to property owners was invalidated for like reasons in *Kramer* v. *Union School District* (1969) 395 U. S. 621. Unreasonable residence requirements, imposed by the State, are likewise invalid, whether for state or federal elections. *Hadnott* v. *Amos* (Three-judge ct. Ala. 1970) 320 F. Supp. 107, *aff'd.* 401 U. S. 968. It is, of course, true, as Justice Stewart observed in *United States* v. *Guest, supra* (383 U. S. at 755) that, "[i]t is a commonplace that rights under the Equal Protection Clause itself arise only

where there has been involvement of the State or of one acting under the color of its authority." Accordingly, there must be some involvement in the election with which this action is concerned by one acting "under color" of state law. "Under color" of law has been construed as identical with and as representing state action. *United States* v. *Price, supra* (383 U. S. at 794, n. 7). It may be represented by action taken directly under a state statute or by a state official acting "under color" of his office. *United States* v. *Classic, supra,* at 326 (313 U. S.); *Screws* v. *United States* (1945) 325 U. S. 91, 107-113. It is, however, not necessary that the "involvement of the State be either exclusive or direct"; it may be merely "peripheral". *United States* v. *Guest, supra* (383 U. S. at 755). Nor is it essential that the state official be a party defendant; it is sufficient if the proof involves "a charge of active connivance by agents of the State" in the wrongful acts done in furtherance of the conspiracy; that will meet the test of state action, as required under the rule enunciated in *Guest. See,* Note, *The Supreme Court, 1965 Term,* 80 *Harv. L. Rev.* 91, at 109 and 155, n. 5.

Guest and *Reynolds* read together, it seems to us, compel the conclusion that a conspiracy by the defendants with which the official election managers connived, in order to dilute through "ballot-box stuffing" the constitutionally protected right of suffrage, as is claimed here, is within the broad language of Section 241, and this is true whether the conspiracy is directed at an election for a state or a federal office, for which the election clerks and managers were essential cogs in the conspiracy. Without their active participation, the conspiracy was ineffective, both at the election itself and in the election contest. The depositing of false ballots in the ballot box required their connivance. The listing of the names of fictitious voters on the voting list had to be done by or with the cooperation of the election clerks. And, when the election contest developed, it was necessary for the election officials and the defendants

to "stick[ing] together and tell[ing] the same story", as certain of the election officials testified without objection they were instructed to do by the defendants just before the election contest hearing.

Accordingly, the argument that federal jurisdiction ended under Section 241 with the certification of the federal election results and that, necessarily, evidence of crimes committed thereafter was inadmissible in this prosecution, is meritless, for the federal government has power not only to punish conspiracies to poison federal elections, but has power also to punish conspiracies, involving state action at least, to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections.

IV.

The defendants also find constitutional fault in Government counsel's jury summation. They complain that the prosecutor, in beginning a review of the testimony of the defendants' witnesses, with the words, "[w]hat do the defendants say?" was guilty of an impermissible comment on the failure of the defendants to testify. Viewed in isolation, the statement might have been of doubtful propriety; but, taken in connection with the comments that followed, for which it was but a rhetorical introduction, it was plainly not violative of the defendants' rights.

The rule, as formulated in most federal circuits, for ascertaining when argument of Government counsel represents improper comment on a defendant's failure to testify, was well stated in *United States Ex Rel. Leake* v. *Follette* (2nd Cir. 1969) 418 F.2d 1266, 1269, *cert. denied* 397 U.S. 1050: " 'Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?' " Applying this rule, we conclude that the statement of the prosecutor was not "manifestly intended" as "a comment on the failure of the accused to

testify." It is true the defendants themselves had not testified. They had, however, offered an extensive defense, directed at the credibility of the Government's witnesses. They had called over thirty witnesses in their defense and had consumed several trial days in presenting their evidence. The challenged language of the prosecutor, expressed in an interrogatory form, was, as we have said, no more than a rhetorical inquiry, directed to the defendants' theory of defense, expressed as a mere predicate for then reviewing in detail that theory and the evidence offered by the defendants in support. This construction of the prosecutor's language and his obvious purpose is clear from the statements that immediately followed the rhetorical inquiry. The prosecutor followed the inquiry with a review of the defendants' defense as developed in their proof. It was to this proof that his inquiry was directed, not to the failure of the defendants to testify.[18] Moreover, the comment of the prosecutor, of which the defendants complain, taken in its context, was not as suggestive as a charge that the defendant "has presented no defense in this case", *United States* v. *Johnson* (4th Cir. 1964) 337 F. 2d 180, 203, *cert. denied* 385 U. S. 846, or an argument

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[18] The record clearly shows the context in which the challenged statement was made. In the opening portion of the Government's closing argument, in reviewing the evidence, Assistant United States Attorney King stated as follows:

> "What do the defendants say? You heard the testimony, thirty some witnesses the defendants called. Apparently they say Sloan and Elswick—
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> "MR. BECKETT: Your Honor, may we approach the bench?
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> "THE COURT: I will entertain it at the end of the argument.
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> "MR. KING: —Sloan and Elswick were behind it all to get Elwood Sloan elected constable. Apparently Mr. Hager, Okey Hager, was an innocent benefactor. He got elected because of it, but Elwood Sloan was the one that needed to get elected constable. Their witnesses had Elwood Sloan and Cecil Elswick out the night before the election offering I believe over $3,000 or more to different people, total to go along with them.
>
> "What else do their witnesses say? Lindsey Workman said that they offered him $300 . . ."

"that the evidence of the government is uncontradicted or unexplained", *Carlisle* v. *United States* (4th Cir. 1912) 194 F. 827, 830; *Davis* v. *United States* (4th Cir. 1960) 279 F. 2d 127, *cert. denied* 364 U. S. 822. *See, also, United States* v. *Lipton* (2nd Cir. 1972) 467 F. 2d 1161, 1168. In no event could it be considered prejudicial to the defendants, when considered along with the clear-cut instruction of the District Court in his subsequent charge. *Cf., United States* v. *Briggs* (2nd Cir. 1972) 457 F. 2d 908, 911-2, *cert. denied* — U. S. —.[19]

V.

Finally, the defendants complain of the District Court's failure to dismiss because the verdict was not supported by substantial or credibile evidence. This argument rests largely on the contention that the Government's witnesses in the main had given conflicting statements, either in affidavits or testimony at the election contest hearing. The credibility of witnesses is, however, a question for the jury. It was the position of the Government that the earlier testimony of the witnesses, whose evidence was assailed by the defendants, had been coerced or induced by false promises. The resolution of such an issue was properly for the jury, which concluded the issue contrary to the position of the defendants. The trial court, who had the opportunity of observing the witnesses, was not disposed to distrust that conclusion by the jury. We find no error in his denial of the motion.

Affirmed.

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[19] Seemingly recognizing the weakness of their position, the defendants have included in their brief certain affidavits to the effect that the District Attorney, when he expressed the question to which the defendants excepted, turned and gestured toward the defendants. Had this occurred, we would not regard it as significant. But we are disturbed that these affidavits were not a part of the record for appeal; they were merely inserted by counsel for the defendants without notice in their printed brief. *See,* Rule 10, F.R.A.P. Any reference to material not in the agreed record for appeal, much less its inclusion in a brief filed with the Court, is both improper and censurable. We have accordingly taken no notice of these affidavits.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

No. 71-1 Cr.

18 U.S.C., Section 241

UNITED STATES OF AMERICA

v.

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH, EARL TOMBLIN

The grand jury charges:

1. WILLIAM M. ANDERSON, at all times material to this indictment, was Clerk of the County Court of Logan County, West Virginia.

2. JOHN R. BROWNING, at all times material to this indictment, was Clerk of the Circuit Court of Logan County, West Virginia.

3. ERNEST L. "RED" HAGER, at all times material to this indictment, was a Deputy Sheriff in and for Logan County, West Virginia.

4. W. BERNARD SMITH, at all times material to this indictment, was State Senator from the Seventh Senatorial District of West Virginia.

5. EARL TOMBLIN, at all times material to this indictment, was the Sheriff of Logan County, West Virginia.

6. On the 12th day of May, 1970, pursuant to the laws of the United States and of the State of West Virginia, a primary election was held within the State of West Virginia for the purpose of nominating candidates for the

offices of United States Senator, Representative to Congress, and various state and county public offices.

7. On the 12th day of May, 1970, many persons who were citizens of the United States and of the State of West Virginia and who were residents of Logan County, West Virginia, were entitled to cast their votes at said election in the several precincts of Logan County for the candidates to said offices, in that such persons were duly registered as voters and possessed the necessary and requisite qualifications provided by law to entitle them to vote at said election in the several precincts of Logan County, West Virginia, including Precinct 86-96, Upper Mount Gay-Lower Mount Gay of said County (hereinafter referred to as the Mount Gay precinct). Many voters at said election in Mount Gay precinct duly voted for candidates for one or more of the aforesaid offices, and their votes were certified and counted as part of the total number of votes cast at the primary election. These voters will hereinafter be referred to as "qualified voters."

8. The said "qualified voters," and each of them, then and there possessed the rights and privileges guaranteed and secured to them by the Constitution and laws of the United States to vote at said election for a candidate for each of said offices, and the further right and privilege to have their votes recorded, counted, and given full effect, that is to say, that the value and effect of their votes and expression of choice should not be impaired, lessened, diminished, diluted, or destroyed by illegal and fictitious votes falsely and fraudulently cast, counted, recorded, and certified.

9. From on or about the 1st day of May, 1970, and continuing until on or about the date of this indictment, in Logan County, West Virginia, within the Southern Judicial District of West Virginia, WILLIAM M. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH, and EARL TOMBLIN, the defendants herein, did unlawfully,

wilfully and knowingly conspire together and with each other, and with divers other persons known and unknown to the grand jury, to injure and oppress the aforesaid qualified voters in the free exercise and enjoyment of certain rights and privileges secured to them, and to each of them, by the Constitution and laws of the United States and particularly the right of suffrage, that is to say, the right to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect as aforesaid.

10. It was a part of said conspiracy that the defendants did cause and attempt to cause votes to be cast in the said Mount Gay precinct by procedures and methods in violation of the laws of the State of West Virginia, and to cause fraudulent and fictitious votes to be cast in said precinct, all with the purpose and intent that said illegal, fraudulent, and fictitious ballots would be counted, returned and certified as a part of the total vote cast in said primary election, thereby impairing, lessening, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in said primary election in Logan County, West Virginia; all of which was done in violation of Title 18, United States Code, Section 241.

A True Bill.

/s/ KENNETH W. MULLINS
Foreman.

A True Copy

Attest:

/s/ JESSIE A. MANCHESTER
Clerk

/s/ W. WARREN UPTON
United States Attorney.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly charged with and convicted of a conspiracy under 18 U.S.C. 241;[1] they argue that the conspiracy neither affected a federal election nor involved state action within the intendment of the statute.

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioners,

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[1] 18 U.S.C. 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

all of whom were state officials,[2] were convicted of having conspired together and with others to injure and oppress the rights of voters to have their votes properly counted, by stuffing the ballot box with illegal ballots during a West Virginia primary election, in violation of 18 U.S.C. 241. Each was sentenced to ten years' imprisonment. The court of appeals affirmed in a lengthy opinion (Pet. App. A; 481 F. 2d 685).

On May 12, 1970, a Democratic primary election was held in Logan County, West Virginia, for the purpose of nominating candidates for federal and local offices, including the Democratic seat on the Logan County Court, for which incumbent Okey Hager was running. Hager's major opponent was Neal Scaggs. The Hager ticket included not only local candidates but nominees for the United States Senate and House of Representatives.

The evidence showed that, prior to the election, petitioners and others conspired to gain control of the Mount Gay precinct—a small but potentially crucial precinct in the election—to insure the nomination of Okey Hager. Promising money and various political favors, and in at least one instance threatening prosecution, petitioners convinced three of the five election officials who operated the Mount Gay precinct to cast illegal votes on the voting machines and then to destroy the poll slips[3] so it could not be determined (except from the machine

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[2] William Anderson was the Clerk of the County Court of Logan County; John Browning was Clerk of the Circuit Court of that county; Earl Tomblin was the Sheriff of Logan County, and Ernest "Red" Hager was one of his deputies; W. Bernard Smith was a State Senator from the Seventh Senatorial District.

[3] Poll slips are consecutively numbered records reflecting the name of each person who actually voted at a particular precinct. See W. Va. Code, ch. 3, art. 1, §22.

tally) how many persons actually voted (*e.g.*, Tr. 342-350, 621-623, 626-634).[4] Cecil Elswick, Calvin Napier, and Janet Sullins, the three election officials who participated in the illegal scheme, testified at trial that, pursuant to this preconceived plan, illegal votes were placed on the voting machines at the Mount Gay precinct which benefited all the candidates on the Hager ticket (*e.g.*, Tr. 356-357, 638-640). After the votes were machine tabulated, Elswick removed the poll slips to his automobile and later threw them in a river (Tr. 643-645).

While only about 250 to 275 persons actually voted at the Mount Gay precinct, the election returns showed a total of 401 persons to have voted (Tr. 358).[5] County Court incumbent Okey Hager allegedly received 294 votes, and challenger Neal Scaggs 67 votes. The county-wide totals in the Hager-Scaggs County Court race, including the fraudulent Mount Gay votes, gave Hager 5,258 votes and Scaggs 5,237.

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[4] "Tr." refers to transcript of the proceedings in the trial court, a copy of which is lodged herewith.

[5] At the time of the election, the records of the Logan County Court listed 541 persons as eligible to vote at the Mount Gay precinct (Gov't Exhibits 1, 4A, 4B). Of that number, 88 testified at the trial that they did not vote in the election, and it was agreed that 134 other persons whose names were read to the jury were registered voters at the Mount Gay precinct who, if called as witnesses, would have testified that they did not vote in the election. Nine registered voters were dead at the time of the election, two were in the hospital, and two were in prison. (Tr. 43-80, 107-121, 129-200, 264-337, 506, 812-820). Thus, at least 235 registered voters did not go to the polls at Mount Gay on May 12, 1970. In addition, eighteen registered voters in that precinct voted by absentee ballot (Tr. 83), which left a maximum of 288 registered Mount Gay voters who could have gone to the polls in this election, and a maximum of 306 who could have voted. This established beyond question that the reported figures were fraudulent.

Following the primary, the results of the Hager-Scagg County Court race were contested in the Logan County Court; contestant Hager sat as one of the two presiding officers in that proceeding. Evidence presented at trial in the instant case showed that petitioners perjured themselves and solicited several other witnesses to testify falsely at the election contest, in a continuing effort to have the illegal votes counted and certified (*e.g.*, Tr. 650-653, 656-659, 668-669, 994-996).

Testimony in the election contest was concluded on August 25, 1970. The County Court was required by statute to rule on the contest by September 17, 1970.[6] That court failed, however, to enter a final order within the statutory period; indeed, it never officially decided the election contest. Scaggs appealed to the Logan County Circuit Court, which, pursuant to West Virginia law, eliminated the entire vote results of the Mount Gay precinct; the effect of that decision was to render Scaggs the nominee. The matter was then taken to the Supreme Court of Appeals of West Virginia, which, on October 21, 1970, ruled that the circuit court had no jurisdiction to act with regard to the contest. *State ex rel. Hager* v. *Oakley*, 177 S. E. 2d 585. As a result, the Mount Gay votes, which included those illegally cast, were counted, and Okey Hager was nominated for the County Court seat in dispute.

1. Petitioners contend that they were improperly charged with a federal offense under 18 U.S.C. 241, because the primary purpose of the conspiracy was to cast fraudulent votes for a purely local candidate. The election, however, involved both local and federal candidates. Where, as here, local and federal candidates are

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[6] See W. Va. Code, ch. 3, art. 7, §7.

joined on a common slate, and the evidence shows that the illegal activities affected the number of votes cast for federal as well as local candidates, the fact that petitioners were concerned primarily with the outcome of the local election does not limit federal jurisdiction. Moreover, contrary to petitioners' assertion, the fact that the federal election results were not actually altered is of no relevance here. It is long settled that

> The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States. [*Fields* v. *United States,* 228 F. 2d 544, 547 (C.A. 4), certiorari denied, 350 U.S. 982.]

Petitioner's claim, in any event, is not well taken. We rely upon the thorough reasoning of the court below to show that, contrary to petitioners' contentions, 18 U.S.C. 241 does apply to interference with local elections if such interference involves state action (Pet. App. 19a-24a). See *United States* v. *Guest,* 383 U.S. 745; *United States* v. *Price,* 383 U.S. 787. In *Reynolds* v. *Sims,* 377 U.S. 533, 554-555, it was stated:

> [T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. * * * The right to vote can neither be denied outright * * * nor diluted by ballot-box stuffing * * *.

As the court below pointed out (Pet. App. 23a-24a; 481 F. 2d at 700):

> It is * * * not necessary that the "involvement of the State be either exclusive or direct"; it may be merely "peripheral". *United States* v. *Guest, supra* (383 U.S. at 755). Nor is it essential that the state official be a party defendant; it is sufficient if the proof involves "a charge of active connivance by agents of the State" in wrongful acts done in furtherance of the conspiracy; that will meet the test of state action, as required under the rule enunciated in *Guest*. [Citation omitted]
>
> *Guest* and *Reynolds* read together, it seems to us, compel the conclusion that a conspiracy by the defendants with which the official election managers connived, in order to dilute through "ballot-box stuffing" the constitutionally protected right of suffrage, as is claimed here, is within the broad language of Section 241, and this is true whether the conspiracy is directed at an election for a state or a federal office, for which the election clerks and managers were essential cogs in the conspiracy. Without their active participation, the conspiracy was ineffective, both at the election itself and in the election contest. The depositing of false ballots in the ballot box required their connivance. The listing of the names of fictitious voters on the voting list had to be done by or with the cooperation of the election clerks. And, when the election contest developed, it was necessary for the election officials and the defendants to "stick[ing] together and tell[ing] the same story" [sic], as certain of the election officials testified without objection they were instructed to do by the defendants just before the election contest hearing.

Thus, whether their conspiracy is viewed as one which affected a federal election or as one by state officials to affect a local election, petitioners in this case violated 18 U.S.C. 241.[7]

2. Noting that the indictment here does not specifically state *in haec verba* that petitioners acted "under color of state law" or that their activities involved "state action" (Pet. 9), petitioners claim alternatively that the indictment failed to allege the requisite state action. The indictment did, however, allege that the conspiracy affected both the federal and local vote results and necessarily involved state officials (see Pet. App. 3b); it alleged the office held by each of the petitioners (Pet. App. 1b); and it specified that they acted together and with others to interfere with the right of qualified voters "to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect as aforesaid" (Pet. App. 3b). Those portions of the indictment, taken together, sufficiently allege state action. Cf. *United States* v. *Guest, supra,* 383 U.S. at 756-757; *United States* v. *Price, supra,* 383 U.S. at 799-800.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[7] In view of this Court's decisions in *Reynolds, Guest* and other Fourteenth Amendment cases, the antiquated lower court decisions cited by petitioners (Pet. 5-6), insofar as they suggest a more limited scope to 18 U.S.C. 241, cannot be regarded as good law.

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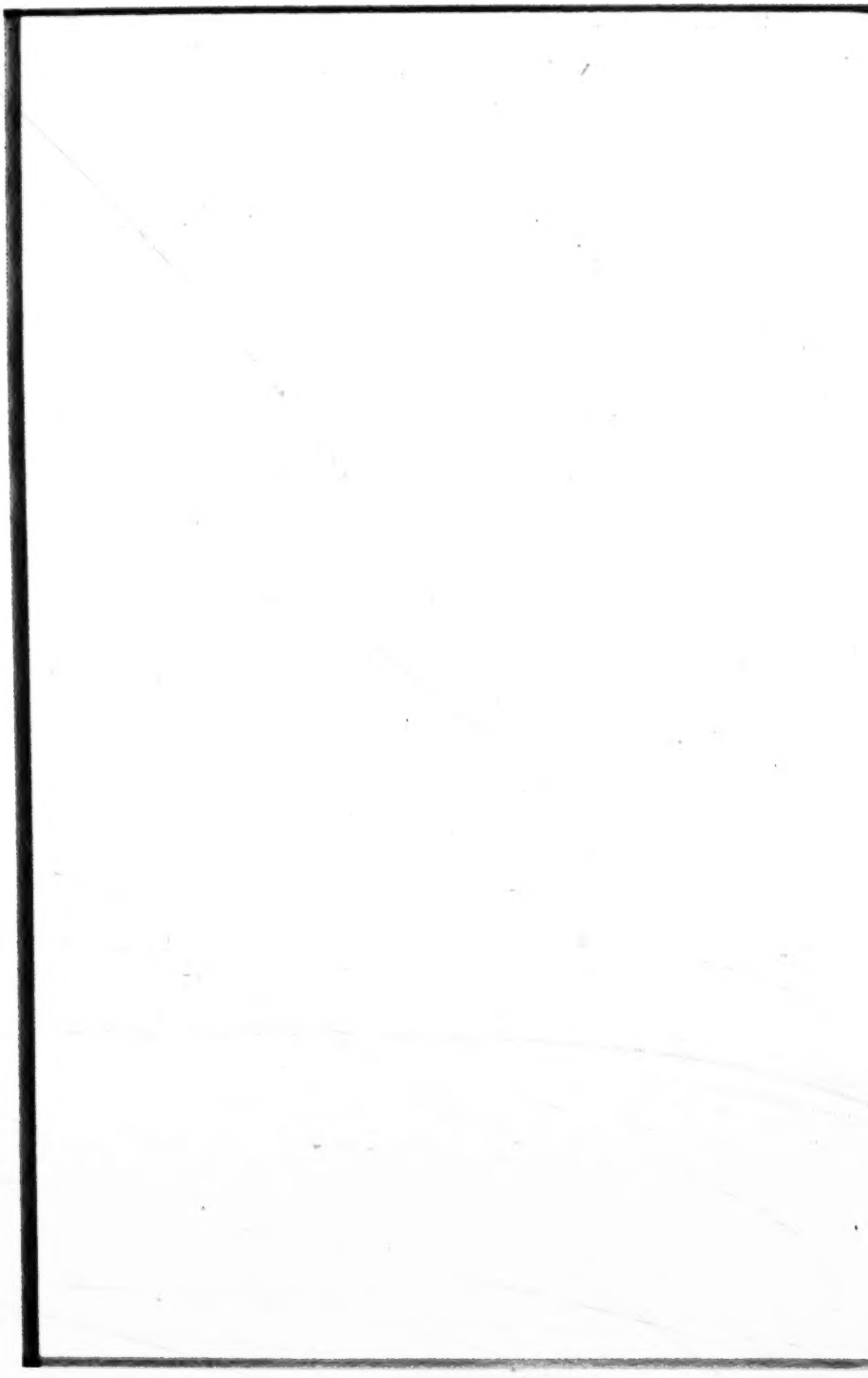

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH AND EARL TOMBLIN, *Petitioners*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A pp. 1a-27a) is reported at 481 F.2d 685.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 26, 1973 (Pet. App. A p. 1a). By Order dated July 13, 1973, the Chief Justice extended the

time for filing a petition for a writ of certiorari to August 25, 1973. The petition was filed on August 24, 1973, and was granted December 10, 1973.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does an alleged conspiracy to cast fraudulent votes in a state primary election for the office of County Commissioner in Logan County, West Virginia, state a federal offense under 18 U.S.C. Section 241?

2. Is an indictment under 18 U.S.C. 241 charging a conspiracy to cast fraudulent votes in a local election defective if it identifies neither the office which is the object of the conspiracy nor the Constitutional right allegedly violated, and if it fails to allege that the conspirators were acting "under color of state law"?

STATUTE INVOLVED

Section 241 of Title 18, United States Code:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

STATEMENT

Petitioners were indicted on January 12, 1971, for violation of Title 18, United States Code, Section 241. The indictment alleged that the defendants conspired together with other persons known and unknown to injure and oppress the qualified voters of Logan County, West Virginia, in the exercise of their Constitutional rights by causing fraudulent votes to be cast in a primary election (Pet. App. B).

There is no dispute about the facts. The alleged conspiracy involved the five named defendants and three election officials, Calvin Napier, Republican Election Clerk, Cecil Elswick, Republican Elections Commissioner, and Janet Sullins, Democratic Election Clerk. According to the testimony, the defendants and the three election officials, conspired to cast fraudulent ballots at the Mount Gay Precinct in Logan County to secure the Democratic nomination for County Commissioner for Okey Hager who was running against Neal Scaggs. Elswick and Sullins posted illegal votes on the precinct's voting machines and Elswick then threw away the poll slips each voter is required to sign so that it could not thereafter be determined how many persons actually voted (App. pp. 23-26, 35-37, 39-45).

According to official records, there were 541 registered voters in the Mount Gay precinct of whom 401 allegedly voted in the primary; not all the voters cast ballots for the office of County Commissioner; of the ballots cast for that office, Okey Hager received 294 votes to his opponent's 67. (Gov't Exhibits 1, 2, 4A, 4B, App. pp. 27, 34) More than 100 ballots were fraudulently cast; Okey Hager received a total of 5258 votes and Mr. Scaggs 5237. The Mount Gay vote thus de-

termined the outcome of the Hager-Scaggs contest (Gov't Exhibit 3)

There was no evidence that the conspiracy involved racial discrimination. Some fraudulent votes were apparently cast for Senator Byrd and Congressman Hechler, candidates for nomination as United States Senator and Representative on the Democratic ticket (App. p. 45), but the evidence introduced at trial showed that the conspiracy was limited to the Democratic nomination for County Commissioner.

The five defendants were all state officials at the time of the alleged conspiracy and trial. William Anderson was the Clerk of the County Court of Logan County. John Browning was Clerk of the Circuit Court of that county. Earl Tomblin was the Sheriff of Logan County, and Ernest "Red" Hager was one of his deputies. W. Bernard Smith was a State Senator from the Seventh Senatorial District. Only Anderson and Browning had any official duties in connection with the primary election; they were responsible for distributing election supplies, preparing election ballots, maintaining the voting records of the County, and issuing and receiving absentee ballots. Anderson and Browning did not use their state offices to carry out the alleged conspiracy; they discharged their election duties properly.

After a twelve-day trial, all of the defendants were found guilty of violating 18 U.S.C. § 241 (App. pp. 68-72); each has been given a provisional maximum sentence of ten years.

SUMMARY OF ARGUMENT

This case involves a conspiracy whose sole purpose was to secure the nomination of Okey Hager as County Commissioner on the Democratic ticket in

Logan County, West Virginia. Congress did not intend 18 U.S.C. Section 241 to cover a conspiracy limited to an election for state or local office.

Section 241 was originally enacted as part of The Enforcement Act of 1870. At that time Congress did not believe it had Constitutional authority to police voting frauds in elections for state or local office except in cases of racial discrimination; it therefore deliberately limited the scope of the Act to areas where it believed it had clear Constitutional authority.

Congress dealt with voting frauds in sections of the Act other than Section 241, and in those other sections only made fraudulent voting in Congressional elections a federal crime. The broad language of Section 241 should not now be held to apply to matters specifically covered elsewhere in The Enforcement Act.

In voting cases, this Court and other federal courts have consistently held that the provisions of The Enforcement Act are limited to voting frauds in Congressional elections and to denial of voting rights because of racial discrimination. No case has held that Act applicable to voting frauds in elections for state and local office.

Since 1870 the Congress has several times considered the proper role of the federal government in state and local elections, most recently in The Voting Rights Act of 1965; it has invariably limited that role to prevention of racial discrimination.

U.S. v. *Guest* and *U.S.* v. *Price* are consistent with this view; they do not require the Court to interpret Section 241 to include voting frauds related solely to state and local elective offices.

This case was tried on the theory that the defendants conspired to dilute the value of validly cast votes for the office of County Commissioner and that the conspiracy resulted in a denial of Fourteenth Amendment rights because it included three election officials acting "under color of state law". The indictment identified neither the office which was the object of the conspiracy nor the Constitutional right allegedly violated nor did it identify the conspirators or allege that they were acting "under color of state law". It failed, moreover, to give details of the offense with which defendants were charged. The indictment was so lacking in specificity that it failed to inform the defendants of the charges against them sufficiently to enable them to prepare an adequate defense, and it failed to inform the Court sufficiently to enable the Court to decide whether the facts would legally support a conviction, if one should be had.

ARGUMENT

I. CONGRESS DID NOT INTEND 18 U.S.C. SECTION 241 TO COVER A CONSPIRACY TO CAST FRAUDULENT VOTES IN AN ELECTION FOR STATE OR LOCAL OFFICE.

This case involves a new application of an old law to an old crime. For more than 100 years Section 241 of Title 18, U.S.C. has been part of the criminal laws of the United States[1] and conspiracies to "stuff

[1] Section 241 originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140, commonly referred to as The Enforcement Act. There were 23 sections in that Act. Section 6 thereafter became Section 5508, Revised Statutes of 1874-1878 (18 Stat. 1067); Section 19 of the Criminal Code of 1909 (35 Stat. 1092); Section 51 of the United States Code, 1926 Codification, (44 Stat. 462) and finally Section 241, United States Code (62 Stat. 696). For convenience, we shall refer to it as Section 241 throughout the brief. Prior versions of Section 241, and other relevant statutes, are reprinted in the Statutory Appendix.

ballot boxes" are as old as the electoral process.[2] However, we have found no reported decision which holds that a conspiracy to cast fraudulent ballots in an election for a state or local office is a federal crime under Section 241. We believe we have found no such case because Congress did not intend the Section to reach such conspiracies.

This case was tried as a conspiracy to cast illegal ballots for the office of County Commissioner of Logan County. The purpose of the conspiracy, as the Assistant United States Attorney clearly stated in his opening remarks, was to secure the Democratic nomination as County Commissioner for Okey Hager (App. pp. 21-22). He was explicit in his closing argument:

> "I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes cast and got the votes counted in the long drawn-out procedure that was involved over there. (App. p. 54; see also pp. 55-57)

The Fourth Circuit also concluded that the conspiratorial purpose ". . . was to secure the Democratic nomination of Okey Hager for County Judge . . . ." (Petition App. A p. 15a).

If the conspiracy had had multiple objectives— the casting of fraudulent ballots for both state and fed-

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[2] A conspiracy to cast fraudulent ballots is a felony in West Virginia, §§ 3-9-1 and 3-9-17 W.Va. Code.

eral offices—and the evidence supported the existence of such a conspiracy, an offense could be stated under Section 241. *U.S.* v. *Rabinowich,* 238 U.S. 78 (1915); *Ingram* v. *U.S.,* 360 U.S. 672 (1959); *U.S.* v. *Gallishaw,* 428 F.2d 760 (CA 2, 1970)

Here there was no evidence of a multiple conspiracy. The defendants were seeking the nomination of Okey Hager for County Commissioner. The case was tried and the conviction affirmed by the Fourth Circuit on this theory, and the issue is now squarely before this Court.[3]

In nearly 2000 pages of trial transcript there is only a single brief reference which might be read as suggesting that one objective of the conspiracy might have been related to federal office (App. pp. 39-40). If a conspiracy with multiple objectives was the theory of the prosecution, it escaped the District Judge since his charge did not present that issue properly to the jury (App. pp. 59-65). See *Ingram* v. *U.S., supra;* cf. *U.S.* v. *Kantor,* 78 F.2d 710 (CA 2, 1935).

The Fourth Circuit reasoned that *U.S.* v. *Guest,* 383 U.S. 745 (1966) and *U.S.* v. *Price,* 383 U.S. 787 (1966) establish that Section 241 encompassed Fourteenth Amendment rights including those protected by The Equal Protection Clause. One such right is the right not to have validly cast votes diluted by "state action" or "under color of state law", *Reynolds* v. *Sims,* 377 U.S. 533 (1964). In this view, a conspiracy

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[3] The central issue in this case was not framed until the argument before the Fourth Circuit (Pet. App. A at p. 19a). One reason is that the indictment itself failed to specify that the object of the alleged conspiracy was the nomination for County Commissioner (Pet. App. B); another is that all of the defendants' several attempts at discovery were denied (App. 10-20).

to cast fraudulent ballots in which state election officials take part results in a denial of equal protection under color of state law and states a crime under Section 241. See *Screws* v. *U.S.*, 325 U.S. 91 (1945)[4] Although the Fourth Circuit's reasoning is consistent, it is at odds with history and the intent of Congress in enacting Section 241.

(a) Congress Did Not Intend the Provisions of The Enforcement Act To Apply to Voting Frauds in Local Elections Because in 1870 It Acted on the Assumption that, Absent Racial Discrimination, Its Authority Was Limited to Congressional Elections.

Section 241 was part of The Enforcement Act of 1870, 16 Stat. 140. The Act provided "for the first time, a comprehensive system for dealing with Congressional elections" *U.S.* v. *Gradwell,* 243 U.S. 476, 482-483 (1917). Of its 23 sections, ten dealt specifically with the right to vote and punished interference with that right; six other sections gave jurisdiction to federal courts and federal officials over persons who violated the Act. Congressional debates make clear that Congress did not intend the sections dealing specifically with voting to apply to nonfederal elections unless some form of racial discrimination

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[4] Unlike the law enforcement officials involved in *Screws* and *Price,* West Virginia election officials have only the most tenuous relationship with the state. They are selected by the executive committee of the two political parties receiving the highest votes at the preceding general election, and the County Court, which makes the official appointment, has no authority to select any other person; § 3-1-28 W.Va. Code; *Williamson* v. *Mingo County Court,* 56 W.Va. 38, 48 S.E. 835 (1904); *State ex rel. Bullard* v. *County Court,* 141 W.Va. 675, 92 S.E.2d 452 (1956); *State ex rel. Tomblin* v. *Bivens,* 150 W.Va. 733, 149 S.E.2d 284 (1966). Their appointment lasts for one week and a single election; they receive nominal compensation; § 3-1-44 and by way of training are required to see one training film; § 3-1-46 W.Va. Code.

was involved. The general language of Section 241 should not be interpreted inconsistently with this Congressional purpose.

Congress did not intend the Act to cover voting frauds for state and local office, absent racial discrimination, because it did not believe then that it had Constitutional authority to operate in this area. This Court has noted the limited Congressional debate about Section 241,[5] but there was substantial debate over the other provisions in the Act especially those involving protection of the right to vote.[6] Critics of the bill in both houses repeatedly argued that the voting sections of the Act were unconstitutional because the federal government had no authority over elections, even federal elections.

Proponents had little difficulty in justifying federal jurisdiction over federal elections under Section 4, Article I of the Constitution[7]; they were considerably more troubled by the prospect of federal inter-

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[5] See *United States* v. *Williams*, 341 U.S. 70 at pp. 74-75 (1951) and *United States* v. *Price*, 383 U.S. 787 at p. 805 (1966).

[6] For the debate in the House see Cong. Globe, 41st Cong., 2nd Sess. pp. 3521-26, 3853-55, 3871-84; in the Senate see pp. 3558-71, 3607-16, 3654-3705, 3752-61, 3801-09.

[7] See Stat. App. p. 1a.

See also remarks of Congressman Bingham, the floor manager of the bill:

> "... The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress. They are expressly limited to elections of those officers. I do not deem it important to say anything further on that point." Cong. Globe, 41st Cong., 2nd Sess., 3871-2.

ference in local elections. The only Constitutional authority these proponents could invoke was the Fifteenth Amendment, which had been ratified only a few months previously; even the strongest supporters of the bill conceded that absent racial discrimination the federal government had no authority over local elections. The following colloquy between Senators Morton and Edmunds is typical.

> "MR. MORTON. . . . Our theory is that the question of suffrage is under the control of the States, and was left to the several States by the Constitution of the United States; and that being the case, Congress had no power to pass a law conferring suffrage on colored men, and it was necessary to amend the Constitution of the United States for that purpose. We therefore provided in the fifteenth amendment that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The proposition to which I call attention is this: that the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suffrage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.
>
> The question now to which I call the attention of the Senate is whether it is in the power of Congress to make provision for punishing violations of the right of suffrage except those violations go to the question of color, race, or previous condition of servitude.
>
> MR. EDMUNDS. But it does not make any difference which the color is, black or white.
>
> MR. MORTON. Not a bit. It does not make any difference which; but if a man is denied the

> right of suffrage because he is a white man, if any State shall assume to deny a man the right of suffrage because he is a white man, then we have a right to interfere; or if because he is a colored man, then we have a right to interfere. But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?
>
> MR. EDMUNDS. Nobody, I think, would claim that we have. I should not say so.
> (Cong. Globe 41st Cong., 2nd Sess. 3571)

Whether Congress had too narrow a view of its own powers is not in issue; we are aware, now, that under the Fourteenth Amendment the federal government has power to punish conspiracies to dilute the right to vote in state or local elections.[8] But when Congress passed The Enforcement Act in 1870, it did not believe that it had such power. The debates make clear that it did not consider that any of the provisions of the Act granted the federal government authority to punish voting frauds—as contrasted with racial discrimination—involving only local offices.

Congress specifically addressed itself in the original Act to the problem of fraudulent voting and registration in Section 19 and 20.[9] Those sections were lim-

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[8] For a discussion of the legislative history of the Fourteenth Amendment as it relates to federal authority over state and local elections see *Reynolds* v. *Sims*, 377 U.S. 593 (1964) (Harlan, J., dissenting opinion); Van Alstyne, The Fourteenth Amendment, *The "Right" To Vote and the Understanding of the Thirty-Ninth Congress*, 1965 Supreme Court Review 33.

[9] Stat. App. pp. 5a-6a; these sections became §§ 5511 and 5512 of the Revised Statutes of 1874-1878 and were repealed by The Act of February 8, 1894, 28 Stat. 36.

ited to "any election for representative or delegate in the Congress of the United States" and supporters emphasized they were intended to cover only frauds in the election of representatives to Congress.[10]

We ask the Court to follow its own rule that "general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the

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[10] "MR. LAWRENCE: . . . Now, sir, if the laws of the States were adequate to protect the citizens of the United States in the exercise of the elective franchise, then it might not be necessary for us to enact any law upon the subject here. But we know that the State laws have not protected the citizens of the southern States against violence, and have not protected the citizens against fraud and force and wrong in more than one of the cities of the northern States. And if the States have failed to enact laws necessary to secure what we all, I trust, have so much at heart, to wit, the purity of the ballot-box, or have failed to execute those already enacted, then it is the highest duty of this Congress to intervene and protect the citizens of the United States in the enjoyment of the elective franchise against force and fraud in the election of Representatives in Congress, leaving the States to provide such legislation as they may deem necessary in the election of local and State officers. . . . It will reach any officer who improperly tampers with the election of a Representative in Congress; but it does not reach any State officer or any citizen in connection with any local or State election.

And now a few words as to the constitutional power to enact this bill . . . .

MR. JONES, of Kentucky: I have not read all the provisions of this bill, and as the gentleman seems to have done so I desire to ask him whether they apply to other elections than those for members of Congress?

MR. LAWRENCE: They apply only to the elections for Representatives and Delegates to Congress. The bill does not propose to interfere with State elections at all."
(Cong. Globe 41st Cong., 3rd Sess. 1276)

general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932); *MacEvoy* v. *U.S.* 322 U.S. 102 (1944); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222 (1957).

(b) Federal Courts Have Uniformly Limited the Scope of the Enforcement Act to Election Frauds Involving Federal Office.

Under The Enforcement Act, we believe the issue of Congressional authority over local elections first came to the federal courts in *U.S.* v. *Cruikshank,* 25 F. Cas. 707 (No. 14,897, C.C.D.La., 1874) aff'd 92 U.S. 542 (1876). An indictment brought under The Enforcement Act specifically charged the defendants with conspiracy under Section 241 to hinder certain citizens in the exercise of their right to vote. The indictment was dismissed. In his opinion for the Court, Mr. Justice Bradley, sitting on circuit, said that Congress had no authority to punish conspiracies to interfere with a person's right to vote in state elections except for cases of racial discrimination:

> "No interference with a person's right to vote, unless made on account of his race, color or previous condition of servitude, is subject to congressional animadversion. There may be a conspiracy to prevent persons from voting having no reference to this discrimination. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the parties. All such conspiracies are amenable to the state laws alone." *U.S.* v. *Cruikshank,* at 713.

Two years later that view was upheld in *U.S.* v. *Reese,* 92 U.S. 214 (1876). In *Reese* this Court held

section 3 and 4 of The Enforcement Act[11] unconstitutional stating:

> "The power of Congress to legislate at all upon the subject of voting at state elections rests upon this [15th] Amendment."
> 92 U.S. at 218.

The principle of *Reese* was reaffirmed three years later in *Ex Parte Siebold,* 100 U.S. 371 (1879)[12] when this Court stated:

> "We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they [judges of election] will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts."
> 100 U.S. at 393.

All cases that have reached this Court under The Enforcement Act, involving prosecution for fraudulent voting practices, have either involved racial discrimination or interference with elections for federal office. *Ex Parte Yarbrough,* 110 U.S. 651 (1884); *U.S.* v. *Mosley,* 238 U.S. 383 (1915); *U.S.* v. *Gradwell,* 243 U.S. 476 (1917); *U.S.* v. *Bathgate,* 246 U.S. 220 (1918); *U.S.* v. *Classic,* 313 U.S. 299 (1941); *U.S.* v. *Saylor,* 322 U.S. 385 (1944); cf. *Logan* v. *U.S.,* 144 U.S. 263 (1892); *Blitz* v. *U.S.,* 153 U.S. 308 (1894); *Burroughs* v. *U. S.,* 290 U.S. 534 (1934).[13]

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[11] See Stat. App., pp. 2a-3a.

[12] The case involved indictments under Section 5515 and 5522 of the Revised Statutes (see Stat. App.). These sections were repealed by the Act of February 8, 1894, 28 Stat. 36.

[13] Lower courts have consistently followed these principles. *U. S.* v. *Nicholson,* 27 F. Cas. 143 (No. 15,877 C.C. D.La., 1878); *U.S.* v. *Amsden,* 6 F. 819 (D.Ind., 1881); *U.S.* v. *Belvin,* 46 F. 381

(Continued on page 16)

We do not suggest that *Cruikshank, Reese* or *Ex Parte Siebold* necessarily reflect existing constitutional limitations on the power of Congress to deal with fraudulent voting practices in local elections. The cases under The Enforcement Act do show, however, that in 1870 Congress knew it was dealing with a clearly marked constitutional danger zone. This Court should not now assume that the Congress chose to disregard the Constitutional limitation which it so clearly recognized. See *Yates* v. *U.S.*, 354 U.S. 298, 319 (1957).

For the past 100 years there have been no prosecutions under Section 241 related solely to state or local elections. We believe this strongly suggests that Section 241 was not meant to reach such practices.

> "The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959)

(Continued from page 15)

(E.D.Va., 1891); *Karem* v. *U.S.*, 121 F. 250 (CA 6, 1903); *U.S.* v. *Kantor*, 78 F.2d 710 (CA 2, 1935); *Walker* v. *U.S.*, 93 F.2d 383, (CA 8, 1937) cert. den. 303 U.S. 644 (1938); *Devoe* v. *U.S.*, 103 F.2d 584 (CA 8, 1939), cert. den. 308 U.S. 571 (1939); *U.S.* v. *Nathan*, 238 F.2d 401 (CA 7, 1956), cert den. 353 U.S. 910 (1957); see also *U.S.* v. *Lackey*, 99 F. 952 (D.C.Ky., 1900), cert. den. 181 U.S. 621 (1901); *Mullen* v. *U.S.*, 106 F. 892 (CA 6, 1901); *U.S.* v. *Aczel*, 219 F. 917 (D.C.Ind., 1915); and *Steedle* v. *U.S.*, 85 F.2d 867 (CA 3, 1936).

The Court's comment in *Romero,* about judges, lawyers or scholars, would seem equally applicable to ambitious —or perhaps inadvertent—prosecuting attorneys.

(c) Since Passage of The Enforcement Act, Congress Has Several Times Considered the Proper Role of the Federal Government in State and Local Elections and Has Confined That Role to the Prevention of Racial Discrimination.

The 41st Congress in 1870 was not the only Congress that undertook to define the proper role for the federal government in state and local elections. The 53rd Congress considered the matter in 1894 and repealed those sections of the Revised Statutes which gave federal courts, marshals and supervisors authority to supervise Congressional elections and which punished voting and registration frauds in those elections. Act of February 8, 1894, 28 Stat. 36. Congress felt that federal interference in the elective process gave rise to unwarranted friction between state and federal authorities.[14]

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[14] "The object of legislation should be to prevent conflicts between the State and Federal authorities. These statutes have been fruitful in engendering them. Enacted in reconstruction times, when it was deemed necessary to carry out those measures, the purpose for which they were framed having happily passed away, we feel that they cannot be too quickly erased from the statute books.

But we regard these statutes as chiefly inimical to the best interests of the people because they are in effect *a vote of lack of confidence* in the States of the Union . . . .

Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it . . . .

Finally, these statutes should be speedily repealed because they mix State and Federal authority and power in the control and regulation of popular elections, thereby causing

(Continued on page 18)

Congress recently reconsidered the matter in the Civil Rights Acts of 1957 [15] and 1964 [16] and The Voting Rights Act of 1965.[17] Those Acts, the Committee Reports accompanying them, and the debates about them show that Congress carefully distinguished between the disparate powers available to it under the Fourteenth and Fifteenth Amendments and was constantly aware of the potential friction which can arise from federal involvement in local elections.[18] It carefully identified the Amendment it wished to implement by legislation and the activities it believed should be subject to federal criminal prosecution. It specifically rejected a proposal to enact a comprehensive law to provide criminal penalties for voting frauds unrelated to racial discrimination.[19]

(Continued from page 17)

> jealousy and friction between the two governments; . . . because their enactment shows a distrust of the States, and their inability or indisposition to properly guard the elections, which, if ever true, has now happily passed away; and last, but not least, because their repeal will eliminate the judiciary from the political arena, and restore somewhat, we trust, the confidence of the people in the integrity and impartiality of the Federal tribunals."
> H.Rep. No. 18, 53rd Cong. 1st Sess. pp. 7-8.

[15] P.L. 85-315.

[16] P.L. 88-352.

[17] P.L. 89-110.

[18] See also Act of August 2, 1939, 53 Stat. 1147.

[19] As we destroy the traditional bastions of discrimination erected at registration and polling places, we must foresee the path of retreat and reentrenchment of those who may continue to preserve the effects of discrimination on account of race or color. Surely, it will be in the form of fraud, intimidation, and corruption. Therefore, we maintain that any effective voting rights bill must

(Continued on page 19)

The history of Congressional action in protecting the right to vote during the past 100 years demonstrates that Congress believes it is a matter which does not "call for the most striking exercise of such [Constitutional] power as might exist", see *U.S.* v. *Mosley,* 238 U.S. 383, 387 (1915). Raising as it does "fundamental questions of federal state relationship",[20] this Court should not interpret Section 241 to reach conspiracies relating solely to voting frauds involving only state and local offices; such a construction would provide federal prosecuting attorneys with authority which Congress has deliberately and consistently withheld from them.

(d) Guest and Price Do Not Require This Court To Interpret Section 241 To Include Voting Frauds Related Only to State and Local Elective Offices.

The Fourth Circuit felt that *U.S.* v. *Guest,* 383 U.S. 745 (1966) and *U.S.* v. *Price,* 383 U.S. 787 (1966)

(Continued from page 18)

include a comprehensive clean elections section. The public record is replete with endless instances of vote frauds, including stuffing the ballot box, tombstone voting, multiple casting of votes by one individual in several precincts or districts, threats and coercion of voters, destruction or alteration of ballots, willful miscounting of votes, and buying votes. These conditions do not exist in just one part of the country, but can be found in many States across the length and breadth of this land.

• • •

We are dismayed by the refusal of the majority in the committee to support our efforts to meet this obvious need. We are unable to understand how anyone could oppose a clean elections law when his vote is subject to public scrutiny, and we shall make every effort to achieve its adoption in the House of Representatives. H.Rep. No. 439, 89th Cong. 1st Sess. pp. 43, 49-50.

[20] *U.S.* v. *Price,* 383 U.S. at 806.

"compel" an interpretation of Section 241 contrary to the one urged here. We disagree. Both those cases involved the denial by violence of well-established Constitutional rights in situations in which Negroes and white civil rights workers were asserting traditional civil rights. The Enforcement Act, and its predecessor, the Act of April 9, 1866,[21] were clearly intended to reach such situations. This case involves neither racial discrimination nor violence.

Guest and *Price* were consistent with the legislative history of The Enforcement Act and with prior federal court decisions. The Fourth Circuit's construction of Section 241 is not.

Guest involved rights under the Equal Protection Clause "firmly and precisely established by a consistent line of decisions in this Court" 383 U.S. at 754. This is not true of rights under the Equal Protection Clause involving state and local elections. The applicability of the Equal Protection Clause to state and local elections was finally determined only a few years ago in *Baker* v. *Carr,* 369 U.S. 186 (1962), and this Court has still to define the full scope of rights protected thereunder. See *Gray* v. *Sanders,* 372 U.S. 368 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969); *Wells* v. *Rockefeller,* 394 U.S. 542 (1969) and *Mahan* v. *Howell,* 404 U.S. 1201 (1971). Only *Guest* involved a prosecution for violation of the Equal Protection Clause. This Court has not yet determined how and whether rules established in civil litigation to safe-

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[21] 14 Stat. 27; presently, Section 242, Title 18, United States Code.

guard voting rights may be enforced in criminal conspiracy prosecution.[22]

Action by this Court approving the use of Section 241 to punish isolated irregularities by local precinct officers in the election of local officials will greatly expand the jurisdiction of the federal courts in an area traditionally reserved to the States. We have found no published statistical data which reveal the magnitude of the potential problem,[23] but we doubt that U.S. attorneys throughout the United States will use this authority to police state and local elections in any general and systematic manner.[24]

It is peculiarly the kind of authority which lends itself to partisan political direction.

In these circumstances and since the subject is a matter of demonstrated Congressional concern, it is appropriate for Congress itself to decide whether the federal government should undertake to supplement the effort of the states to punish voting conspiracies which have as their sole objective election of a state or local official.

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[22] Would, for example, a conspiracy by election officials to open the polls late or close them early be subject to § 241? Would an agreement among State legislators to establish unequal state legislative districts subject them to prosecution under § 241?

[23] But see Note, *Illegal Election Practices in Philadelphia*, 106 U.Pa.L.R. 279 (1957).

[24] On the question of prosecutorial discretion, see Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law and Contemporary Problems 64 (1948). If federal officials did undertake this function, it could well involve unwarranted federal intervention in state affairs. cf. *O'Shea* v. *Littleton*, — U.S.L.W. — (U.S. Jan. 15, 1974).

II. THE CONVICTION SHOULD BE REVERSED BECAUSE THE INDICTMENT DID NOT INFORM THE DEFENDANTS OF THE CHARGES AGAINST THEM WITH SUFFICIENT PRECISION TO ENABLE THEM TO PREPARE AN ADEQUATE DEFENSE.

The indicted in paragraph 6 stated that on May 12, 1970, a primary election was held within the State of West Virginia "for the purpose of nominating candidates for the offices of United States Senator, Representatives to Congress, and various state and county public officers." This statement was purely factual. In paragraph 9 the indictment proceeded to charge the defendants with a conspiracy to injure the qualified voters of Logan County by denying them their Constitutional right to have their votes fully counted in the May 1970 primary "for the aforesaid offices" (Pet. App. B).

The form of the indictment was similar to those used in other Section 241 prosecutions, e.g., *U.S.* v. *Kantor,* 78 F.2d 710 (CA 2, 1935); *Walker* v. *U.S.,* 93 F.2d 383 (CA 8, 1937); *Ledford* v. *U.S.,* 155 F.2d 574 (CA 6, 1946), cert. den. 329 U.S. 733 (1946). All of those prosecutions involved prosecutions for interference with elections for federal office.

Defendants moved to dismiss the indictment (App. pp. 8-9); the District Court denied the motion on the grounds that it adequately charged "Defendants with the offense under Title 18 U.S.C. Section 241" (App. p. 17). We agree that the indictment charged an offense under Section 241. The Fourth Circuit correctly observed:

> "[It] described with as much particularity as the indictment in *United States* v. *Saylor* (1944) 322 U.S. 385, the wrongful acts intended to be accomplished by the conspirators." (Pet. App. A, p. 2a)

Saylor, however, like all other prosecutions for voting irregularities under Section 241, involved a conspiracy whose object was the election of a federal official. Although in this case the government alleged a conspiracy to cast fraudulent votes in a federal primary election—in order to bring the case within Section 241—it disregarded this allegation at trial and sought to prove a conspiracy that had as its object the election of a county commissioner.

The Government's theory was that the five defendants and three election officials conspired to dilute the value of validly cast votes for the office of county commissioner in a primary election; that this conspiracy resulted in a denial of the Fourteenth Amendment rights of the qualified voters of Logan County because it included three election officials acting under color of state law. In the indictment, however, there was no suggestion that the defendants or their co-conspirators were acting "under color of state law," no identification of the Constitutional right allegedly denied, and no specification of the office which was the object of the conspiracy. The indictment thus failed clearly to inform the accused of the charges against them so that they could prepare their defense and not be taken by surprise by the evidence offered at trial, *Berger* v. *U.S.,* 295 U.S. 78 (1935); *Hallman* v. *U.S.,* 208 F.2d 825 (CA D.C., 1953).[25]

The defendants did attempt to discover the nature of the charges against them prior to trial. Counsel filed a Motion for Discovery and Inspection (App. pp. 10-11); a Motion for a Bill of Particulars (App.

[25] The indictment was, we believe, specific enough to plead a formal acquittal or conviction in the event defendants were indicted a second time for alleged criminal activity in connection with the 1970 primary election.

pp. 11-13) and a Motion for Full Disclosure as Provided Under the Omnibus Hearing Project (App. pp. 18-19). All motions were denied (App. pp. 17, 20).

Since the indictment alleged that each defendant was a state official, and named no other co-conspirators, each reasonably assumed that the alleged conspiracy involved only the duties of the two named co-conspirators (Anderson and Browning) who did have official election functions. This assumption proved to be wrong. Because the indictment rested on Section 241, the defendants also assumed that it charged, and that the prosecution would seek to prove, a conspiracy to influence the outcome of an election for federal office, and they prepared their defense accordingly. It was not until the beginning of the trial that the defendants and their counsel learned that the alleged conspiracy involved a state office, and it was not until late in the fourth day of trial that they learned who the unnamed co-conspirators were, and where the alleged conspiratorial acts took place. As a practical matter it was then too late to prepare an adequate defense.

The form of the indictment in this case is in marked contrast to the indictments under Section 241 in *U.S.* v. *Price,* 383 U.S. 787 (1966) and *U.S.* v. *Guest,* 383 U.S. 745 (1966). In *Price* the indictment specifically charged that the defendants were acting "under color of the laws of Mississippi." In *Guest* the Court held that the allegation that the defendants had conspired to intimidate Negroes in their equal use of state facilities "by causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts" was a sufficient allegation of state action to prevent dismissal of the indictment. In both cases the indictments also gave important de-

tails of the offenses with which defendants were charged.

Under modern rules of pleading indictments are no longer dismissed for minor and technical deficiencies. That principal, however, cannot be used to deny the fundamental safeguard that a properly drawn indictment gives to those charged with serious crimes. *Smith* v. *U.S.*, 360 U.S. 1 (1959); *Russell* v. *U.S.*, 369 U.S. 749 (1962). The deficiencies of this indictment are not mere technicalities of pleading. They go to the heart of the requirement that the government must inform persons charged with serious crime of the charges against them so they can prepare an adequate defense.

An important corollary purpose is served by the requirement that an indictment set out the specific offense used to invoke federal jurisdiction and the broad provisions of Section 241. This purpose, as stated in *U.S.* v. *Cruikshank*, 92 U.S. 542, 558 is "to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a convicton, if one should be had." See *Russell* v. *U.S.*, *supra*. By this standard also the indictment was deficient. An indictment so lacking in specificity as this one, if sustained, would first enable the Government to defeat a motion to dismiss by arguing that a conspiracy to cast fraudulent votes in a Congressional election clearly states an offense under Section 241. The Goverment could then proceed to try the case on the basis of a conspiracy to cast votes in an election for local office. And this was in fact done.[26] On ap-

[26] The vagueness of a one-count indictment like the present one would also defeat a motion of judgment of acquittal at the close of the Government's evidence.

peal the Government would be free to urge affirmance on whatever basis appeared desirable after trial.

Section 241 is a conspiracy statute which requires no overt act as an element of the offense.[27] If prosecutions under such statute are to be free from the potential for abuse which this Court has previously identified,[28] the Government should be required to allege the specifics of the offense charged under Section 241 with sufficient particularity to meet the standards set forth in *Cruikshank* and *Russell*.[29] Tested by these standards, the indictment in this case was substantially and substantively defective.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

DAVID GINSBURG
ALBERT J. BEVERIDGE, III

January 24, 1974

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[27] *Williams* v. *U.S.*, 179 F.2d 644 (CA 5, 1950), aff'd 341 U.S. 70 (1951).

[28] See *Krulewitch* v. *U.S.*, 336 U.S. 440 (1949) (Jackson, J. concurring opinion).

[29] A proper indictment would also have considerably sharpened the issues for trial. For example, the indictment charged that the purpose of the conspiracy was to obtain "certification" of fraudulent votes. After "certification" and before the indictment was handed down, two of the defendants had testified in a state election contest. Over objection, the trial court permitted the government to introduce their testimony and other evidence of post-certification activities against all of the defendants.

Admission of such evidence was erroneous and contrary to this Court's holding in *Krulewitch* v. *U.S.*, *supra*; *Lutwak* v. *U.S.*, 344 U.S. 604 (1953); and *Grunewald* v. *U.S.*, 353 U.S. 391 (1957).

These errors have their origin in the vagueness of the indictment.

STATUTORY APPENDIX

U.S. Constitution

Article I, Section 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Act of May 31, 1870, 16 Stat. 141

CHAP. CXIV.—*An Act to enforce the Right of Citizens of the United States to vote in the several States of the Union, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

SEC. 2. *And be it further enacted,* That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof,

be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

SEC. 3. *And be it further enacted,* That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act; and any judge, inspector, or other officer of election whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen upon the presentation by him of his affidavit stating such offer and the time and place thereof, and the same of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every offense be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

SEC. 4. *And be it further enacted,* That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify to vote or from voting at any election as aforesaid, such person shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offense be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

SEC. 5. *And be it further enacted,* That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with

intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offense may be committed.

SEC. 19. *And be it further enacted,* That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once at the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such

State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution.

SEC. 20. *And be it further enacted,* That if, at any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any

person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote, or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act, the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor, as provided in section nineteen of this act for persons guilty of any of the crimes therein specified: *Provided,* That every registration made under the laws of any State or Territory, for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purposes of any State, territorial, or municipal election.

Act of February 28, 1871, 16 Stat. 433

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty of the "Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May thirty-one, eighteen hundred and seventy, shall be, and hereby is, amended so as to read as follows:—

"SEC. 20. *And be it further enacted,* That if, [at] any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right

so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty or any law reglating the same; or if any such officer shall knowingly and willfully register as a voter any person not entitled to be registered, or refuse to so register any person entitled to be registered; or if any such officer or other person whose duty it is to perform any duty in relation to such registration or election, or to ascertain, announce, or declare the result thereof, or give or make any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law, or violate any duty imposed by law, or do any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person shall aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor as provided in section nineteen of said act of May thirty-one, eighteen hundred and seventy, for persons guilty of any of the crimes specified: *Provided*, That every registration made under the laws of any State or Territory for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made

for the purposes of any State, territorial or municipal election."

Revised Statutes of 1874-1878

SEC. 5506. Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment.

SEC. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured or because of his having so exercised the same; or if to him by the Constitution or laws of the United States, two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover be thereafter ineligible to any office, or

place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 5511. If, at any election for Representative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself, or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels, or induces, by any such means, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of an election or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution.

SEC. 5512. If, at any registration of voters for an election for Representative or Delegate in the Congress of

the United States, any person knowingly personates and registers, or attempts to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently registers, or fraudulently attempts to register, not having a lawful right so to do; or does any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevents or hinders any person having a lawful right to register from duly exercising such right; or compels or induces by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interferes in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induces any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer knowingly and willfully registers as a voter any person not entitled to be registered, or refuses to so register any person entitled to be registered; or if any such officer or other person who has any duty to perform in relation to such registration or election, in ascertaining, announcing, or declaring the result thereof, or in giving or making any certificate, document, or evidence in relation thereto, knowingly neglects or refuses to perform any duty required by law, or violates any duty imposed by law, or does any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person aids, counsels, procures, or advises, any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every person shall be punishable as prescribed in the preceding section.

SEC. 5522. Every person, whether with or without any authority, power, or process, or pretended authority, power, or process, of any State, Territory, or municipality, who

obstructs, hinders, assaults, or by bribery, solicitation, or otherwise, interferes with or prevents the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who by any of the means before mentioned hinders or perverts the free attendance and presence at such places of registration or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room, where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or who molests, interferes with, removes, or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal, or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than three thousand dollars, or by both such fine and imprisonment, and shall pay the cost of the prosecution.

Criminal Code of 1909, 35 Stat. 1092

SEC. 19. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the

premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 20. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

United States Code, 1926 Codification, 44 Stat. 462

SECTION 51. Conspiracy to injure persons in exercise of civil rights.—If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 481 F. 2d 685.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1973. On July 13, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 25, 1973. The petition was filed on August 24, 1973, and was granted on December 10, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to have false votes cast, counted and certified for all candidates on a particular

534-088—74——1

slate, including candidates for federal and local office, violates 18 U.S.C. 241, where the principal objective of the conspiracy is to affect the election for a local office.

2. Whether the indictment in this case sufficiently alleged that petitioners were acting "under color of state law."

STATUTE INVOLVED

Section 241 of Title 18, United States Code, provides, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * *
>
> * * * * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

Petitioners were indicted on January 12, 1971, for an alleged violation of 18 U.S.C. 241. The indictment (Pet. App. B) charged a conspiracy by the defendants, all identified in the indictment as state or county officials,[1] and unnamed co-conspirators,[2] to

[1] William Anderson was identified as the Clerk of the County Court of Logan County; John Browning as the Clerk of the Circuit Court of that County; Earl Tomblin as the Sheriff of Logan County; Ernest "Red" Hager as a Deputy Sheriff of that County; and W. Bernard Smith as a State Senator for the Seventh Senatorial District (Pet. App. B, p. 1b).

[2] The evidence established, and the trial judge charged, that certain named election officials and others were co-conspirators (A. 59–60).

cast false and fictitious votes for federal, state and local candidates in a primary election.[3]

---

[3] The indictment alleged in part (Pet. App. B, pp. 1b–3b):

* * * * *

"6. On the 12th day of May, 1970, pursuant to the laws of the United States and of the State of West Virginia, a primary election was held within the State of West Virginia, for the purpose of nominating candidates for the offices of United States Senator, Representative to Congres, and various state and county public offices.

* * * * *

"9. From on or about the 1st day of May, 1970, and continuing until on or about the date of this indictment, in Logan County, West Virginia, within the Southern Judicial District of West Virginia, WILLIAM M. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH, and EARL TOMBLIN, the defendants herein, did unlawfully, wilfully and knowingly conspire together and with each other, and with divers other persons known and unknown to the grand jury, to injure and oppress the aforesaid qualified voters in the free exercise and enjoyment of certain rights and privileges secured to them, and to each of them, by the Constitution and laws of the United States and particularly the right of suffrage, that is to say, the right to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect as aforesaid.

"10. It was a part of said conspiracy that the defendants did cause and attempt to cause votes to be cast in the said Mount Gay precinct by procedures and methods in violation of the laws of the State of West Virginia, and to cause fraudulent and fictitious votes to be cast in said precinct, all with the purpose and intent that said illegal, fraudulent, and fictitious ballots would be counted, returned and certified as a part of the total vote cast in said primary election, thereby impairing, lessening, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in said primary election in Logan County, West Virginia; all of which was done in violation of Title 18, United States Code, Section 241."

After a jury trial the defendants, all petitioners here, were convicted. Each was provisionally sentenced to the maximum term of imprisonment under 18 U.S.C. 241 (ten years), as required by 18 U.S.C. 4208 (b) pending the results of studies pursuant thereto.[4] The court of appeals affirmed (Pet. App. A).

On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate, United States House of Representatives and various state and local offices. Prior to the election, the petitioners, in conjunction with three election officials, Calvin Napier (Republican Election Clerk), Cecil Elswick (Republican Election Commissioner), and Janet Sullins (Democratic Election Clerk), conspired to obtain control of the Mount Gay precinct in Logan County, by having the "house set up"[5] (A. 25; Tr. 1173–1174),[6] *i.e.*, by gaining the connivance of all officials at one polling place in an attempt to bring about the election, illegally if necessary, of one political faction (A. 25; Tr. 347, 1146). In this instance the Mount Gay precinct was "set up" in an effort to insure the nomination of all the candidates, state and federal, running

[4] The resentencing contemplated by 18 U.S.C. 4208(b) does not occur until the defendant has served three months of the provisional sentence, during which period the study is made. Since petitioners have remained free on bail and have not yet been incarcerated, they have not yet been resentenced.

[5] "House" refers to the precinct house or voting place, here the Mount Gay schoolhouse.

[6] "Tr." refers to the transcript of proceedings in the district court (a certified copy of which has been filed in this Court).

on one of the Democratic primary slates (A. 39–41, 43–45; Tr. 1143–1147, 1418–1419).

In Logan County, one of the nominations most prized and actively contested was for a seat on the Logan County Court.[7] Among the several Democratic candidates for the seat was the incumbent, Okey Hager, and his major opponent, Neal Scaggs. Hager and Scaggs each headed a slate or faction of candidates, which included, on one slate or the other, all the major contestants for Democratic nominations in this primary (Tr. 410–411, 1097).

The Hager slate included not only other local candidates, but also Senator Robert Byrd, whose name was on the ballot for renomination to the United States Senate, and Congressman Ken Hechler, whose name was on the ballot for renomination to the United States House of Representatives (A. 37, 39–40, 44–45). Other candidates also sought these federal nominations (see G. Ex. 2[8]).

The evidence revealed that by using the powers of their offices the petitioners convinced[9] at least the above-named three elections officials, who were operating the Mount Gay precinct on election day, to cast

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[7] In West Virginia the County Court is "the central governing body of the county" (*State ex rel. Dingess* v. *Scaggs*, 195 S.E. 2d 724, 726 (W. Va. Sup. Ct. App.)), and is vested with a wide variety of legislative, executive and judicial powers. See W. Va. Code, ch. 7, Art. 1, §§ 3, *et seq.*

[8] "G. Ex." refers to the government's exhibits introduced in evidence.

[9] The participation of the co-conspirators was secured by threats of indictment or arrest, or promises of county jobs and money (see, *e.g.*, A. 24–26, 40–44).

false and fictitious votes on the voting machines for the entire Hager slate and then to destroy the poll slips[10] so that the number of persons who had voted could not be determined except from the machine tally (A. 23–26, 39–45; Tr. 628–632). Elswick, Napier and Sullins, the three election officials who participated in the scheme, testified that, pursuant to this preconceived plan, votes were placed on the voting machines at the Mount Gay precinct benefiting all the candidates, federal, state and local, running on the Hager slate.[11]

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[10] Poll slips are consecutively numbered records reflecting the name of each person who actually voted at a precinct. See W. Va. Code, ch. 3, Art. 1, § 22.

[11] For example, Cecil Elswick, the election official who actually put the illegal votes on the machine, testified (A. 39–40, 44–45):

"Q. What went on at that meeting, that first time you met with [petitioner] Hager?

"A. Well, Red Hager told me he knew I had been appointed as a republican election officer, commissioner, to serve in the house, and he wanted me to go along with them and if I didn't that he would cause me trouble.

"Q. Did he tell you what he meant by going along with them?

"A. Go along and help win the Mount Gay precinct on election day.

"Q. For whom?

"A. For the Okey Hager slate and Senator Byrd and Ken Hechler.

"Q. Who else was on that slate, if you know?

"A. Charles Gilliam, House of Delegates; he was on it.

* * * * *

"A. I would go with her [Janet Sullins] and we had it arranged when we got in the machine with the voter we would make sure that the voter was in the middle and we was on each

The evidence established that only Elswick actually placed false votes on the machines, while Napier (A. 33; Tr. 347) and Sullins (Tr. 871, 875–876, 921) stood by and either diverted the attention of voters or merely ignored the casting of false votes as they had been told to do.

After the votes were machine-tabulated, Elswick took the poll slips to his automobile and later threw them in a river (Tr. 643–645).

While only about 250 to 275 persons actually voted at the Mount Gay precinct and the evidence showed that no more than 306 could have voted, the election

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side of the voter, and they would say this is the way they wanted to vote. I kept the slate over there with me and I just voted my slate. If they wanted to vote for Neal Scaggs, we would vote them for Okey Hager unless we thought one would catch us, and if we thought they would catch us we would vote the way they wanted to vote.

"Q. Mr. Elswick, did you put any illegal votes on those machines that day?

"A. Yes, sir, we did.

"Q. How many?

"A. I lost count at about ninety. It was over a hundred. I lost count that evening and we put more on after I lost count, so it was over 100 votes.

"Q. Who were you putting those votes on there for?

"A. I was putting them on there for Senator Byrd and Ken Hechler and Okey Hager slate, Leroy Counts, House of Delegates, Charles Gilliam, and all their slate."

Election official Janet Sullins testified that she was aware that Elswick was putting votes on for the entire "Hager slate" (Tr. 875–876); others referred to it as the "Byrd slate" (see, *e.g.*, testimony of Robert Marcum, Tr. 1418–1419), but all the evidence indicates that, regardless of nomenclature, the "slate" referred to encompassed candidates for both federal and local offices.

returns showed a total of 401 votes cast for some offices (A. 26–27, 46; Tr. 873).[12]

The certificate of the results of the Mount Gay precinct Democratic primary (G. Ex. 2) indicated that, among other totals, Senator Byrd received 342 votes, Congressman Hechler 314 votes, Okey Hager 294 votes and Neal Scaggs 67 votes.[13] The county-wide totals in the Hager-Scaggs race, including the Mount Gay votes, gave Hager a margin of victory of only 21 votes. Thus, without the 227-vote margin in the Mount Gay precinct, Hager would have lost his bid for renomination.

After the winners of the primary had been certified on May 27, 1970, certain returns (not including the

[12] At the time of the election the records of the Logan County Court listed 541 persons as eligible to vote at the Mount Gay precinct (G. Exs. 1, 2, 4A, 4B). Of the 541 eligible, 88 testified at the trial that they did not vote in the election, and it was agreed that 134 other persons whose names were read to the jury were registered voters at the Mount Gay precinct who, if called as witnesses, would testify that they did not vote in the election. Nine registered voters were dead at the time of the election, two were in the hospital and two were in prison. (Tr. 43–80, 107–121, 129–200, 264–337, 506, 812–820.) Thus, at least 235 registered voters did not go to the polls at Mount Gay on May 12, 1970. In addition, eighteen registered voters in that precinct voted by absentee ballot (Tr. 83), which left a maximum of 288 registered Mount Gay voters who could have gone to the polls in this election, and a maximum of 306 who could have voted. This established beyond question that the reported figures were fraudulent.

[13] The fact that the federal candidates each received more votes than could legally have been cast establishes conclusively that they received fraudulent votes which were counted and certified in the county totals. The difference between their total votes and the votes for Hager could reflect split-ticket voting by some who voted for Scaggs.

votes for the federal candidates in the Mount Gay precinct) were disputed in an election contest case brought by Scaggs in state court. Evidence presented at trial in the instant case showed that petitioners perjured themselves and solicited other witnesses to testify falsely on behalf of the Hager faction in that state election contest case, all in a continuing effort to have the fraudulent votes counted and certified (A. 28–32, 37–39, 46–50, 52–53). The Mount Gay votes, including those illegally cast, were ultimately counted, and Okey Hager was nominated for the County Court seat in dispute.[14] The votes cast in the Mount Gay precinct for the federal candidates, which were not challenged, were also counted, although in neither federal race did they affect the result.

In affirming petitioners' convictions, the court of appeals held that the indictment sufficiently alleged a conspiracy to cast false votes in elections for federal offices, *inter alia,* and hence stated an offense in violation of 18 U.S.C. 241. In rejecting a belated claim

[14] The election suit, at which candidate Hager was one of two presiding judges (Tr. 490, 1038), was concluded on August 25, 1970. Although the court was required by statute to rule on the contest by September 17, 1970 (see W. Va. Code, ch. 3, Art. 7, § 7), it failed to enter a final order within the statutory period and, indeed, never officially decided the election contest.

Scaggs appealed to an intermediate appellate court, which eliminated the entire vote results of the Mount Gay precinct (and thus in effect awarded the nomination to Scaggs). The Supreme Court of Appeals of West Virginia thereafter ruled that the intermediate appellate court had had no jurisdiction to act with regard to the contest since no decision had been made by the state trial court within the statutory time allowed. *State ex rel. Hager* v. *Oakley*, 177 S.E. 2d 585.

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by petitioners that evidence concerning the state election contest was inadmissible because a conspiracy to affect only a state or local election was beyond the reach of Section 241, the court also concluded that Section 241 prohibits a conspiracy to cast false votes in such elections, at least where the conspiracy involves "state action" or action "under color of law" (Pet. App. 23a). On the record in this case, the court found sufficient evidence of such action.

SUMMARY OF ARGUMENT

In our view, this Court need not reach any novel question in this case because the indictment alleged and the evidence showed that one of the purposes of the conspiracy here was the casting and counting of fraudulent votes in the election of candidates for federal offices. Under long-established principles, such activity is prohibited by Section 241 (see, *e.g., United States* v. *Saylor,* 322 U.S. 385; *United States* v. *Classic,* 313 U.S. 299), even if the principal purpose of petitioners' conspiracy was to cast and have counted fraudulent votes for local candidates running on the same tickets. *Ingram* v. *United States,* 360 U.S. 672.

In any event, the court of appeals was correct in holding that Section 241 also prohibits conspiracies, involving state action, to cast false votes in state or local elections. The right to vote in such elections, free from invidious discrimination, is protected against state action by the Fourteenth Amendment, and under this Court's decisions in *United States* v. *Guest,* 383 U.S. 745, and *United States* v. *Price,* 383

U.S. 787, the protection of Section 241 extends to all rights secured by that Amendment. Petitioners' historical arguments to the contrary have been repeatedly rejected by this Court, in applying Section 241 both in the context of interference with voting rights and in other contexts.

Although in our view the Court need not reach the issue, we also contend that the indictment in this case adequately alleged action under color of state law. It alleged a conspiracy to affect both federal and local vote results by means of activities which necessarily implicated involvement by state election officials; and it also alleged the state office held by each of the petitioners. Under the standards applied by this Court in *Guest, supra,* 393 U.S. at 754–757, these allegations were sufficient.

ARGUMENT

I. SECTION 241 WAS VIOLATED BY THE PETITIONERS' CONSPIRACY TO CAST FALSE VOTES FOR BOTH FEDERAL AND LOCAL CANDIDATES RUNNING ON A PARTICULAR PRIMARY SLATE

Petitioners' entire argument in this Court is based on the contention that the sole purpose of their conspiracy was to cast fraudulent votes for a local candidate, and that they therefore were improperly charged with a federal offense under 18 U.S.C. 241. Indeed, petitioners concede that if the conspiracy had been directed at "the casting of fraudulent ballots for both state and federal offices" (Br. 7–8), Section 241 would reach it. In our view, that concession is both legally correct and factually dispositive of the case, since the record shows that the conspiracy here was precisely

of that nature. Accordingly, the Court need not, and should not, reach petitioners' principal contention—with which we disagree—that Section 241 does not apply to a conspiracy solely to cast false votes in a state or local election.

A. A CONSPIRACY TO CAST FALSE VOTES FOR CANDIDATES RUNNING ON THE SAME SLATE FOR BOTH FEDERAL AND LOCAL OFFICES VIOLATES SECTION 241 EVEN IF THE LOCAL OFFICES ARE THE PRINCIPAL CONCERN OF THE CONSPIRACY

The indictment in this case alleged, and the evidence established, that one of the purposes of the petitioners' conspiracy was to have false votes cast, counted and certified in the primary election of candidates for federal office. Thus, the indictment, after referring expressly to the holding of a primary election for both federal and state offices (Pet. App. 1b–2b), charged the petitioners with having conspired to interfere with the right of qualified voters to vote "for candidates for the *aforesaid offices*" (Pet. App. 3b; emphasis added). In its opening statement the government said it would prove that the fictitious votes at issue in the case included votes for candidates for federal office (A. 23), and, as recounted in the Statement, *supra*, substantial evidence to this effect was put before the jury.

For example, Cecil Elswick, the election commissioner who actually placed the fraudulent votes on the voting machine (see pp. 6–7, *supra*), testified that he was threatened with trouble by one of the petitioners if he did not "go along with them" in the casting of votes for nominees to both federal and state offices (A. 39–40) and that he did in fact cast more than 100 false votes for both federal and state nominees in the Mount

Gay precinct (A. 44–45). The evidence thus showed that local and federal candidates were joined on a common slate, that the conspiracy was directed toward the casting and counting of false ballots for the entire slate, and that the activities conducted in furtherance of the conspiracy included the actual casting of false votes for federal as well as local candidates (see pp. 6–7, *supra*, n. 11). This, we submit, established a classic violation of Section 241 under this Court's cases.

It has long been settled that a conspiracy to dilute the value of the votes of qualified voters, by means of ballot box stuffing, at an election for federal offices is a violation of Section 241 (*United States* v. *Saylor*, 322 U.S. 385; see, also, *United States* v. *Mosley*, 238 U.S. 383) and that Section 241 applies to primary, as well as general, elections for federal offices (*United States* v. *Classic*, 313 U.S. 299; *Klein* v. *United States*, 176 F. 2d 184 (C.A. 8), certiorari denied, 338 U.S. 870; see *Smith* v. *Allwright*, 321 U.S. 649, 659–660). And the fact that the outcome of the federal election may not actually have been altered by the acts done in furtherance of the conspiracy is immaterial:

> The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] * * * is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.

Prichard v. *United States*, 181 F. 2d 326, 331 (C.A. 6), affirmed due to absence of quorum, 339 U.S. 974. See also *United States* v. *Saylor, supra*, 322 U.S. at 389; *Fields* v. *United States*, 228 F. 2d 544, 547 (C.A. 4), certiorari denied, 350 U.S. 982; *United States* v. *Skurla*, 126 F. Supp. 713, 717 (W.D. Pa.).

It is, of course, commonplace for elections to be held simultaneously for state and federal offices, and numerous decisions have sustained the application of Section 241 (*Devoe* v. *United States*, 103 F. 2d 584, 586–587 (C.A. 8), certiorari denied, 308 U.S. 571; *Shannabarger* v. *United States*, 99 F. 2d 957, 958–960 (C.A. 8); *United States* v. *Pleva*, 66 F. 2d 529, 530 (C.A. 2); cf. *United States* v. *Nathan*, 238 F. 2d 401, 403, 409 (C.A. 7), certiorari denied, 353 U.S. 910) or of other federal criminal statutes (*Blitz* v. *United States*, 153 U.S. 308, 313–314; *In re Coy*, 127 U.S. 731, 751–755) where fraudulent votes have been cast for both the federal and the state or local candidates on the ballot.

Finally, petitioners acknowledge, as they must, that a conspiracy may have several purposes (Br. 7–8) and that it is sufficient if only one of the purposes would violate Section 241. However, their contention that the only purpose of their conspiracy was to affect the nomination for a local office is, as we have seen (*supra*, pp. 4–8, 12–13), contrary to both the allegations of the indictment and the evidence—which showed that the scheme also included the casting of false votes for the federal offices.

Apparently, petitioners' contention is that, although their scheme involving the casting of false votes for all candidates on the Hager ticket meant that they would

knowingly have false votes cast and counted for both federal and state candidates, their *motive* in doing so was solely to affect the outcome of the local contest. Although petitioners introduced no evidence specifically showing that this was their reason for conspiring to have false votes cast for the federal candidates, it is entirely plausible that they would have believed that stuffing more than 100 false ballots in a single precinct for the local candidates would have been too conspicuous and too likely to arouse suspicion in the absence of the casting of a similar number of false votes for the federal candidates as well. But even if this was their motive for conspiring to cast false votes for federal candidates,[15] we fail to see why this would be a

[15] The court of appeals' statement, relied upon by petitioners, that the "true object and purpose" of the conspiracy was to secure Hager's nomination for County Judge (Pet. App. 18a) was made in the course of a discussion, in connection with an evidentiary question, of the continuing nature of the conspiracy, which was to last until the fraudulent votes "were finally given effect in the election result * * *." *Ibid.* The court held that the evidence was properly admissible because the conspiracy was not limited to the purpose of merely casting fraudulent votes but extended also to the purpose of having those votes be given effect. Since the entire theory of the case—reflected in the indictment, the evidence and the instructions to the jury (and petitioners made no objection to the instructions in this regard)—was that there had been a single conspiracy to have false votes cast and counted for the Hager slate of federal and false candidates, the evidence of acts done in furtherance of the conspiracy's objectives during the continuing contest over the state results (after the federal results had been certified and were not being contested) was, we submit, properly admissible without any need for the court of appeals to decide whether Section 241 applies to conspiracies confined to state elections. See *Lutwak* v. *United States*, 344 U.S. 604, 617–618; *Devoe* v. *United States*, *supra*, 103 F. 2d at 587–589. The petition for

defense, under any theory, to the charge under Section 241—any more than it would be a defense to a charge of conspiring to rob a federally insured bank that the conspirators intended to use the proceeds solely to bribe voters in an election for local office (cf. *United States* v. *Bathgate,* 246 U.S. 220).[16]

Indeed, the essence of petitioners' position was rejected by this Court in a similar context in *Ingram* v. *United States,* 360 U.S. 672, 679–680:

> Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, *United States* v. *Rabinowich,* 238 U.S. 78, 86, and if one of its objectives, even a minor one, be the * * * [violation of federal law], the offense is made out, though the primary objective may be concealment of another crime.[17]

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certiorari in this case presents no question concerning the admission of this evidence (although it does, of course, challenge the theory on which the court of appeals chose, unnecessarily in our view, to sustain its admissibility).

[16] This Court, in *In Re Coy, supra,* rejected a contention that an indictment under two sections of the Enforcement Act was defective because, although it charged a conspiracy to keep illegally the returns of elections for both state and federal offices, it did not charge that the defendants intended to falsify or otherwise tamper with the returns for the federal office. 127 U.S. at 753–755. As the Court explained in *Blitz* v. *United States, supra,* 153 U.S. at 313–314, the federal provision designed to prevent the possibility of fraud in federal elections was appropriately applied in *Coy,* even if "the only purpose of the conspirators may have been to obtain the custody of such returns for the purpose of fraudulently changing them so far as they applied to certain state officers." *Id.* at 313.

[17] The "other crime" referred to in *Ingram* was viewed by the Court as one subject to prosecution by local authorities. 360 U.S. at 680.

Under the authority of *Ingram*, and the evidence adduced, petitioners' convictions were properly based on their having conspired to dilute votes in two federal election contests. Since this Court's decisions in *Saylor* and *Classic, supra*, establish that Section 241 prohibits such conduct and that, as so applied, the statute is a proper exercise of the long-recognized congressional power to protect the integrity of federal elections (see *Ex parte Yarbrough*, 110 U.S. 651; *Burroughs* v. *United States*, 290 U.S. 534), there is no need in this case for the Court to decide any novel question.[18]

B. IN ANY EVENT, THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT SECTION 241 ALSO PROHIBITS CONSPIRACIES, INVOLVING STATE ACTION, TO CAST FALSE VOTES IN STATE OR LOCAL ELECTIONS

While for the reasons previously explained we believe it was unnecessary for the court of appeals to decide the question in this case, we agree with the court's holding that Section 241 prohibits "conspiracies, involving state action at least, to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections" (Pet. App. 24a), and we agree generally with the court's legal analysis (Pet. App. 20a–24a) in reaching that conclusion.

1. Petitioners' contention that Section 241 cannot be applied to a conspiracy concerning only state or local vote fraud rests upon the type of narrow construction of Section 241 and its predecessors which was squarely rejected in *United States* v. *Guest*, 383 U.S. 745, and *United States* v. *Price*, 383 U.S. 787,

[18] See n. 15, *supra*.

where this Court most recently considered the history and scope of Section 241.

In *Price*, this Court stated (383 U.S. at 801):

> We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.

In these opinions, the Court settled the questions remaining after *United States* v. *Williams*, 341 U.S. 70, as to whether Section 241 is applicable to any and all Fourteenth Amendment rights. The Court found no basis for excluding from the general language of Section 241 the rights secured by the due process clause or the equal protection clause of that Amendment. *Price, supra*, 383 U.S. at 800–806; *Guest, supra*, 383 U.S. at 753–755. As the Court stated in *Price, supra*, 383 U.S. at 805:

> We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.

In attempting to avoid the thrust of *Guest* and *Price* and the broad language of the statute, petitioners contend primarily that Section 241, insofar as it can be read to cover voting at all,[19] must be read as limited to federal elections, because the Congress which passed the Enforcement Act deemed itself with-

[19] The historical argument against applying Section 241 to voting rights was set forth in detail in the dissenting opinions in *Mosley*, *supra*, 238 U.S. at 388–393; *Classic*, *supra*, 313 U.S. at 331–341; and *Saylor*, *supra*, 322 U.S. at 390–393, and was decisively and, we submit, conclusively rejected by the Court in those cases.

out power to reach conduct affecting state and local elections which did not involve racial discrimination (Br. 10–17).

In making this argument, petitioners concede, as they must, that Congress has the constitutional authority to "punish conspiracies to dilute the right to vote in state or local elections" (Br. 12). Their argument with respect to the perceptions of Congress in 1870 as to its powers necessarily assumes, however, that the Enforcement Act of 1870 was an entirely coherent, consistent and symmetrical enactment. It was not. It was a composite, hastily welded together out of disparate pieces, attributable to a variety of sponsors having particular concerns.[20]

Senator Pool, the author of Section 6 of the Act (now Section 241), had perhaps the broadest view and

[20] Thus, Sections 1–4 of the Act—which were concerned solely with the right to vote—derived from the parent bill reported by the Senate Judiciary Committee as a substitute for other voting measures before the Senate. 91 Cong. Globe, 2942, 3479–3480. Sections 16 and 17—which reenacted provisions of the Civil Rights Act of 1866 and ultimately became 18 U.S.C. 242—are traceable to an amendment submitted by Senator Stewart of Nevada. *Id.* at 3480. And Section 6—now our Section 241—, together with Section 7, was proposed by Senator Pool. *Id.* at 3612, 3679. There were many other amendments. See *id.* at 3688 (comment of Senator Trumbull). Just before the bill was finally passed, one Senator characterized it as "a conglomeration of incongruities and contradictions" and claimed no one knew its true content in light of the number of amendments hastily adopted (*ibid.*, Senator Thurman). Another member accurately stated: "The bill as it now stands is the child of many fathers. It is a piece of patchwork throughout." *Ibid.* (Senator Casserly). See, also, *United States* v. *Williams*, 341 U.S. 70, 74–75, n. 2 (opinion of Mr. Justice Frankfurter).

meant to protect all rights against all interference, including those rights recently declared by the Fourteenth Amendment, which he thought Congress might safeguard against both official and unofficial invasion.

In introducing Section 241 in its original form,[21] he explicitly referred to "rights which are conferred upon the citizen by the fourteenth amendment" as among those covered by his provision. 91 Cong. Globe 3611; *id.* at 3613. In context, it is clear that the sponsor of the provision had in mind the rights conferred by both the due process and equal protection clauses, and this Court's decisions in *Guest* and *Price* have confirmed that intention. Thus, Senator Pool's statements and the other legislative history of the adoption of the Enforcement Act of 1870 establish that the original form of Section 241 was designed to embrace "*all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." *Price, supra,* 383 at 800 (emphasis in the original).

This Court has also made it clear that Section 241 is not limited to the protection of rights recognized as being secured by the Constitution at the time of the enactment of that Section or its predecessors. Thus, in *Guest* the Court held that Section 241 applies to interference with rights which were not recognized as being secured by the Fourteenth Amend-

[21] Senator Pool's speech introducing the amendment which became Section 6 of the Enforcement Act of 1870, and ultimately Section 241, is reproduced in its entirety as an Appendix to the opinion of the Court in *Price, supra,* 383 U.S. at 807–810.

ment until relatively recently. 383 U.S. at 754, n.6.[22] As the court of appeals noted, ballot box stuffing interferes with the very core, not the periphery, of the right to vote, free from invidious discrimination, secured by the Constitution (Pet. App. 21a-22a).

2. Petitioners also contend that the entire subject of voting (whether in state or federal elections) should be excluded from the coverage of Section 241 because the problem of fraudulent voting and registrations was addressed specifically in Sections 19 and 20 of the Enforcement Act of 1870 (Br. 12–14) which provisions—since repealed (28 Stat. 36)—applied only to congressional elections. This argument, which assumes that there was no overlap between the provisions of the 1870 Act, has been dispositively rejected by this Court.

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[22] Of course, there must be the requisite specific intent to interfere with the right in question, whether it be one of long-standing or only recent recognition. See *Guest*, *supra*, 383 U.S. at 760; *Screws* v. *United States*, 325 U.S. 91, 106–107. In the instant case no question has been raised concerning the treatment of the specific intent requirement in the charge to the jury (A. 61–64). And, as in *Guest*, "the rights under the Equal Protection Clause" at issue here "have been so firmly and precisely established by a consistent line of decisions in this Court, that the lack of specification of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness." 383 U.S. at 754 (footnote omitted). See, *e.g.*, *Smith* v. *Allwright*, 321 U.S. 649; *Reynolds* v. *Sims*, 377 U.S. 533; *Avery* v. *Midland County*, 390 U.S. 474; *Kramer* v. *Union School District*, 395 U.S. 621; *Cipriano* v. *City of Houma*, 395 U.S. 701; *Hadley* v. *Junior College District*, 397 U.S. 50. Indeed, the stuffing of ballots by a State would also violate procedural due process. Cf. *United States* v. *Atkins*, 323 F. 2d 733, 743 (C.A. 5).

Thus, in *United States* v. *Mosley, supra,* and *United States* v. *Saylor, supra,* the Court concluded, after full consideration, that vote fraud conspiracies concerning congressional elections were covered by Section 241 even though they had been specifically covered by the repealed Sections 19 and 20 of the 1870 Act. See, also, *United States* v. *Classic, supra,* 313 U.S. at 322, n. 5.

Similarly, in *Price* the Court concluded that certain activities covered by 18 U.S.C. 242 (which derives from Section 17 of the 1870 Act) could also be covered by the broader and more general provisions of Section 241. 383 U.S. at 802, n. 11. In addition to the greater breadth of Section 241, the Court noted the differences in the sanctions provided for violations of the allegedly duplicative sections as a basis for rejection of the duplication argument. *Ibid.;* see *United States* v. *Williams,* 341 U.S. 70, 88, n. 2 (Douglas, J., dissenting). The same considerations apply here, since the sanctions for violation of Sections 19 or 20 of the Enforcement Act were more lenient that those for violation of Section 6 of that Act, the forerunner of Section 241. Compare Pet. Br. App. 4a–5a with *id.* at 5a–6a.

In sum, neither the specific treatment of voting fraud in other sections nor an earlier view of Congress' powers now recognized to be unduly narrow warrants the conclusion that Section 6 of the Enforcement Act, now Section 241, is inapplicable to a conspiracy utilizing state action to interfere, by means of casting false ballots, with the right to vote in state or local elections. This valuable right, no less than all

other rights secured by the Fourteenth Amendment, is within the broad coverage of the statute.

II. THE INDICTMENT IN THIS CASE SUFFICIENTLY ALLEGED ACTION "UNDER COLOR OF STATE LAW" BY PETITIONERS AND THEIR CO-CONSPIRATORS

The second question presented in this case (Pet. 2)[22]—whether the indictment was defective because it did not allege action under color of state law—does not arise if the Court agrees with our argument in point I A, *supra,* because there is indisputably no requirement of state action under Section 241 where the conspiracy is one to interfere with voting for candidates for Congress. *United States* v. *Classic, supra,* 313 U.S. at 315. Should this Court reach the question whether Section 241 applies to conspiracies to interfere with state elections (discussed in point IB, *supra*), however, it is our contention that the indictment in this case was adequate, under the standards previously applied by this Court, to allege action under color of state law.

[22] Much of petitioners' argument ostensibly related to the second question presented actually concerns assertedly erroneous evidentiary rulings (Pet. Br. 26, n. 29) and claimed deficiencies of the indictment other than the failure to allege that the petitioners acted under color of state law (Br. 23–26). Since these contentions go beyond, and are not fairly comprised within, the questions presented in the petition, we do not respond to them, other than to note that such of the contentions as were raised below were adequately discussed and properly rejected in the opinion of the court of appeals (*e.g.*, Pet. App. 2a–5a, 9a–11a, 16a–24a).

Although the indictment does not state *in haec verba* that petitioners acted "under color of state law" or that their activities involved "state action," it does, taken as a whole, sufficiently allege state action to bar dismissal. See *Guest, supra,* 383 U.S. at 754–757; cf. *Price, supra,* 383 U.S. at 799–800.[24] The indictment did allege that the conspiracy affected both federal and local vote results (see pp. 3, 12, *supra*), and embraced activities which necessarily involved state election officials (see Pet. App. 3b). Moreover, it alleged the office held by each of the petitioners (*id.* at 1b) and that they had acted together and with others to interfere with the right of qualified voters to have their votes given full and honest effect (*id.* at 3b). Together, these portions of the indictment sufficiently allege state action under the standards adopted by this Court in *Guest.*

Of course, the evidence adduced at trial showed that not only did petitioners conspire with local election officials to stuff the ballot boxes (see, pp. 5–8, *supra*), but also that petitioners Tomblin and Hager (Sheriff and Deputy Sheriff respectively) promised

[24] In *Guest*, for example, the indictment was held sufficient even though the only suggestion of state action was the allegation that one of the nine means by which the defendants (none of whom was said to be a public officer) had conspired to interfere with the exercise of constitutional rights was by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts * * *." 383 U.S. at 748 n. 1, 756.

favors,[25] threatened arrests and indictments, and did other acts of which they were capable only because of their official capacities (A. 37–38, 40, 47). The conspiracy was thus shown to involve sufficient state action to sustain a conviction under Section 241 for improper dilution of votes at a local election.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1974.

[25] The promises included appointment of Cecil Elswick to the job of deputy sheriff (A. 40–42, 48–49); help in Calvin Napier's marital troubles because they knew the judge (A. 24); and business for Garrett Sullins who was running for justice of the peace (A. 36).

U.S. GOVERNMENT PRINTING OFFICE: 1974

Syllabus

ANDERSON ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-346. Argued March 19, 1974—Decided June 3, 1974

For having conspired to cast fictitious votes for federal, state, and local candidates in a West Virginia primary election, petitioners were convicted of violating 18 U. S. C. § 241, which makes it unlawful to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States. At the trial, over petitioners' objections, certain statements made by two of the petitioners at a local election contest hearing held after the election results had been certified on May 27, 1970, were admitted in evidence against all the petitioners to prove that the two petitioners making the statements had perjured themselves at the election contest hearing. On appeal, the petitioners contended for the first time that § 241 was limited to conspiracies to cast false votes in federal elections, and that accordingly the conspiracy charged in their case, as far as federal jurisdiction was concerned, ended on May 27, so that subsequent out-of-court statements could not have furthered any § 241 conspiracy and hence should not have been admitted in evidence. The Court of Appeals rejected these contentions, and affirmed the convictions. *Held:*

1. The out-of-court statements were admissible under basic principles of the law of evidence and conspiracy, regardless of whether or not § 241 encompasses conspiracies to cast fraudulent votes in state and local elections. Pp. 214–222.

(a) The statements were not hearsay, since they were not offered in evidence to prove the truth of the matter asserted; hence their admissibility was governed by the rule that acts of one alleged conspirator can be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, even though they may have occurred after the conspiracy ended. *Lutwak* v. *United States*, 344 U. S. 604. Pp. 219–221.

(b) Since the statements were not hearsay, the jury did not have to make a preliminary finding that the conspiracy charged

was still in progress before it could consider them as evidence against the other defendants, and accordingly the statements were admissible if relevant to prove the conspiracy charged. P. 221.

(c) Even if the federal conspiracy ended on May 27, the fact that two of the petitioners perjured themselves at the local election contest hearing was relevant and admissible to prove the underlying motive of the conspiracy. Accordingly, in order to rule on petitioners' challenge to the admissibility of this evidence, there was no need for the Court of Appeals, and there is no need for this Court, to decide whether petitioners' conspiracy ended on May 27 for purposes of federal jurisdiction or whether § 241 applies to conspiracies to cast fraudulent votes in local elections. Pp. 221–222.

2. The evidence amply supports the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for the federal candidates. Pp. 222–228.

(a) The fact that petitioners' primary motive was to affect the result in the local rather than the federal election has no significance, since although a single conspiracy may have several purposes, if one of them—whether primary or secondary—violates a federal law, the conspiracy is unlawful under federal law. Pp. 225–226.

(b) That the petitioners may have had no purpose to change the outcome of the federal election is irrelevant, since that is not the specific intent required under § 241, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to have their expressions of choice given full value, without dilution or distortion by fraudulent balloting. Pp. 226–227.

(c) Even assuming, *arguendo*, that § 241 is limited to conspiracies to cast false votes for federal candidates, it was not plain error for the District Court's jury instructions not to focus specifically upon the federal conspiracy, since in view of the fact that the prosecution's case showed a single conspiracy to cast entire slates of false votes and the defense consisted primarily of a challenge to the Government witnesses' credibility, it is inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without also finding a similar conspiracy affecting the federal offices. Pp. 227–228.

481 F. 2d 685, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 228.

David Ginsburg argued the cause for petitioners. With him on the brief was *Albert J. Beveridge III*.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Bork*, *Assistant Attorney General Pottinger*, *Gerald P. Norton*, *Walter W. Barnett*, and *Jeffrey R. Whieldon*.

MR JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners were convicted of violating 18 U. S. C. § 241 which, in pertinent part, makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ." Specifically, the Government proved that petitioners engaged in a conspiracy to cast fictitious votes for candidates for federal, state, and local offices in a primary election in Logan County, West Virginia. At the trial, a question arose concerning the admissibility against all of the petitioners of certain out-of-court statements made by some of them. In considering the propriety of the District Court's decision to admit this evidence, the Court of Appeals thought it necessary to resolve the question whether a conspiracy to cast false votes in a state or local election, as opposed to a conspiracy to cast false votes in a federal election, is unlawful under § 241. The Court of Appeals affirmed petitioners' convictions, concluding that § 241 encompasses "conspiracies, involving state action at least, to dilute the effect of ballots

cast for the candidate of one's choice in wholly state elections." 481 F. 2d 685, 700–701 (1973). We granted certiorari to consider this question. 414 U. S. 1091 (1973). It now appears, however, that the out-of-court statements at issue were admissible under basic principles of the law of evidence and conspiracy, regardless of whether or not § 241 encompasses conspiracies to cast fraudulent votes in state and local elections. Accordingly we affirm the judgment of the Court of Appeals without passing on its interpretation of § 241.

I

The underlying facts are not in dispute. On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate, United States House of Representatives, and various state and local offices. One of the nominations most actively contested in Logan County was the Democratic nomination for County Commissioner, an office vested with a wide variety of legislative, executive, and judicial powers.[1] Among the several candidates for the Democratic nomination for this office were the incumbent, Okey Hager, and his major opponent, Neal Scaggs.

Petitioners are state or county officials, including the Clerk of the Logan County Court, the Clerk of the County Circuit Court, the Sheriff and Deputy Sheriff of the County, and a State Senator. The evidence at trial showed that by using the power of their office, the petitioners convinced three election officials in charge of the Mount Gay precinct in Logan County to cast false and fictitious votes on the voting machines and then to

[1] The County Commissioner sits on the County Court which is the central governmental body in the county. See *State ex rel. Dingess* v. *Scaggs*, — W. Va. —, —, 195 S. E. 2d 724, 726 (1973). See W. Va. Code Ann., § 7–1–3 *et seq.* (1969).

destroy poll slips so that the number of persons who had actually voted could not be determined except from the machine tally.[2] While it is apparent from the record that the primary purpose behind the casting of false votes was to secure the nomination of Hager for the office of County Commissioner, it is equally clear that about 100 false votes were in fact cast not only for Hager, but also for Senator Robert Byrd and Representative Ken Hechler, who appeared on the ballot for renomination to their respective chambers of the United States Congress, as well as for other state and local candidates considered part of the Hager slate.[3]

The conspiracy achieved its primary objective, the countywide vote totals showing Hager the winner by 21 votes, counting the Mount Gay precinct returns. About two weeks after the election, on May 27, 1970, the election results were certified. After that date, Scaggs filed an election contest[4] challenging certain returns, includ-

[2] The participation of the election officials was secured by threats of indictment or arrest, or promises of county jobs and money.

[3] Of the 541 persons eligible to vote at the Mount Gay precinct, the Government proved that 222 did not vote and that 13 more were either dead, in the hospital, or in prison. This left a maximum of 306 who could have voted. Observers at the precinct throughout election day estimated that about 275 persons had actually voted. Nevertheless 348 votes were recorded as cast for candidates for the nominees for United States Senator, 328 for Congressman, 358 for State Senator, 458 for House of Delegates, 375 for County Commissioner (long term), 365 for County Commissioner (short term), 371 for Justice of the Peace, and 371 for Constable.

[4] The election contest, at which candidate Hager was one of the two presiding judges, was concluded on August 25, 1970. Although the court was required by statute to rule on the contest by September 17, 1970, see W. Va. Code Ann., § 3-7-7, it failed to enter a final order within the statutory period. Scaggs appealed to an intermediate appellate court, which granted an appeal. The Supreme Court of Appeals of West Virginia, however, ruled that the intermediate appellate court lacked jurisdiction since no decision had been

ing the Mount Gay County Commissioner votes. No challenge was made, however, to the Mount Gay votes for either of the federal offices, and they became final on May 27.

A hearing was held in the County Court on the election contest at which petitioners Earl Tomblin and John R. Browning gave sworn testimony. The prosecution in the § 241 trial sought to prove that Tomblin and Browning perjured themselves at the election contest hearing in a continuing effort to have the fraudulent votes for Hager counted and certified. For example, one of the key issues in the election contest was whether sufficient voters had in fact turned out in Mount Gay precinct to justify the unusually high reported returns. Tomblin testified under oath at the election contest that he had visited Mount Gay precinct on election day and had observed one Garrett Sullins there as Sullins went in to vote. The prosecution at the § 241 trial, however, offered testimony from Sullins himself that he was in the hospital and never went to the Mount Gay precinct on election day.

At trial, the other defendants objected to the introduction of Tomblin's prior testimony on the ground that it was inadmissible against anyone but Tomblin. The District Court overruled the objection but instructed the jury that Tomblin's testimony could be considered only as bearing upon his guilt or innocence, unless the jury should determine that at the time Tomblin gave this testimony, a conspiracy existed between him and the other defendants and that the testimony was made in furtherance of the conspiracy, in which case the jury could consider the testimony as bearing upon the guilt

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rendered by the County Court within the statutory time allowed. See *State ex rel. Hager* v. *Oakley*, 154 W. Va. 528, 177 S. E. 2d 585 (1970).

or innocence of the other defendants. A similar objection was made to the introduction of Browning's election contest testimony and a similar cautionary instruction given when that objection was overruled.

In oral argument before the Court of Appeals, petitioners for the first time [5] sought to link their objection to the introduction of this evidence to a particular interpretation of § 241. See 481 F. 2d, at 694. Specifically, petitioners argued that § 241 was limited to conspiracies to cast false votes in federal rather than local elections. Accordingly, they contended that the conspiracy in the present case, so far as federal jurisdiction was concerned, ended on May 27, 1970, the date on which the election returns were certified and the federal returns became final. Statements made after this date by one alleged conspirator, the argument continued, could not, as a matter of law, have been made in furtherance of the

[5] Other gounds for exclusion argued before the District Court and in the briefs before the Court of Appeals have not been pursued here. These include a contention that introduction of the prior testimony had the effect of putting Tomblin and Browning on the witness stand in violation of their constitutional right to stand mute, a suggestion that since the testimony was given in a judicial hearing there might be *Miranda* problems, and the argument that the prior testimony of Tomblin and Browning was inadmissible impeachment evidence since both had exercised their constitutional right not to testify. See 481 F. 2d 685, 694.

The Court of Appeals recognized that it need not ordinarily consider grounds of objection not presented to the trial court. See *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1941). This rule is not without its exceptions, however, particularly in criminal cases where appellate courts can notice errors seriously affecting the fairness or integrity of judicial proceedings. See *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). See also *Hormel* v. *Helvering*, *supra*, at 557. In view of the fact that petitioners did challenge the admissibility of the Tomblin and Browning testimony at trial, we think it was proper for the Court of Appeals to consider all grounds related to that underlying objection.

conspiracy charged under § 241 and therefore should not have been considered by the jury in determining the guilt or innocence of the other defendants.

The Government countered before the Court of Appeals that, whether the federal conspiracy had ended or not, the election contest testimony of Tomblin and Browning was admissible under the principles enunciated in *Lutwak* v. *United States*, 344 U. S. 604 (1953). The Court of Appeals, however, decided not to tarry over this point and instead, in its own words, chose "to meet directly the contention that federal jurisdiction over the alleged conspiracy ended with the certification in the federal election contests . . . ." See 481 F. 2d, at 698. We think it inadvisable, however, to reach out in this fashion to pass on important questions of statutory construction when simpler, and more settled, grounds are available for deciding the case at hand. In our view, the basic principles of evidence and conspiracy law set down in *Lutwak* are dispositive of petitioners' evidentiary claims.

The doctrine that declarations of one conspirator may be used against another conspirator, if the declaration was made during the course of and in furtherance of the conspiracy charged, is a well-recognized exception to the hearsay rule which would otherwise bar the introduction of such out-of-court declarations. See *Lutwak* v. *United States*, *supra*, at 617. See also *Krulewitch* v. *United States*, 336 U. S. 440 (1949). The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has "scrupulously observed."[6]

[6] The rationale for both the conspiracy-hearsay exception and its limitations is the notion that conspirators are partners in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253 (1940); *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946). As such, the law deems them agents of one another. And just as the declarations of

See *Krulewitch* v. *United States*, *supra*, at 443–444. See also *Lutwak* v. *United States*, *supra*, at 617–618; *Fiswick* v. *United States*, 329 U. S. 211, 217 (1946); *Wong Sun* v. *United States*, 371 U. S. 471, 490 (1963).

But, as the Court emphasized in *Lutwak*, the requirement that out-of-court declarations by a conspirator be shown to have been made while the conspiracy charged was still in progress and in furtherance thereof arises only because the declaration would otherwise be hearsay. The ongoing conspiracy requirement is therefore inapplicable to evidence, such as that of *acts* of alleged conspirators, which would not otherwise be hearsay. Thus the Court concluded in *Lutwak* that acts of one alleged conspirator could be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, "even though they might have occurred after the conspiracy ended." 344 U. S., at 618. See also *United States* v. *Chase*, 372 F. 2d 453 (CA4 1967); Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 988 (1959).

The obvious question that arises in the present case, then, is whether the out-of-court statements of Tomblin and Browning were hearsay. We think it plain they were not. Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted.[7] The election contest testimony of Tomblin and Browning, however, was not admitted into evidence

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an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner. See *Krulewitch* v. *United States*, 336 U. S. 440, 442–443 (1949); *Fiswick* v. *United States*, *supra*, at 217; *Wong Sun* v. *United States*, 371 U. S. 471, 490 (1963). See generally 4 J. Wigmore, Evidence §§ 1077–1079 (Chadbourne rev. 1972).

[7] See 5 J. Wigmore, Evidence § 1361 (3d ed. 1940); C. McCormick, Law of Evidence 460 (1954).

in the § 241 trial to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made [8] so as to establish a foundation for later showing, through other admissible evidence, that they were false.[9] The rationale of the hearsay rule is inapplicable as well. The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.[10] Here, since the prosecution was not contending that anything Tomblin or Browning said at the election contest was true, the other defendants had no interest in cross-examining them so as to put their credibility in issue.[11] Cf. *Pointer* v. *Texas*, 380

[8] Of course, evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement. See *Dutton* v. *Evans*, 400 U. S. 74, 88 (1970) (opinion of STEWART, J.). See also *Creaghe* v. *Iowa Home Mut. Cas. Co.*, 323 F. 2d 981 (CA10 1963); *General Tire of Miami Beach, Inc.* v. *NLRB*, 332 F. 2d 58 (CA5 1964); *Safeway Stores, Inc.* v. *Combs*, 273 F. 2d 295 (CA5 1960); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F. 2d 874 (CA1 1966).

[9] Thus, in his opening argument the prosecutor said: "I believe the evidence will show, frankly, that that election contest was full of perjurious testimony, full of lies. Some of it, the evidence will show, was solicited and caused by these defendants." App. 22. The same point was made in closing argument. Tr. 1851–1852.

[10] See 5 J. Wigmore, *supra*, n. 7, at § 1362. See also *Colorificio Italiano Max Meyer, S. P. A.* v. *S/S Hellenic Wave*, 419 F. 2d 223 (CA5 1969); *Rossville Salvage Corp.* v. *S. E. Graham Co.*, 319 F. 2d 391 (CA3 1963); *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783 (CA7 1950), cert. denied, 340 U. S. 930 (1951).

[11] Technically, of course, the proffered evidence was hearsay in that the Government sought to prove the prior testimony of Tomblin and Browning by reading a transcript of the election contest hearing into evidence at the § 241 trial, rather than by calling as a witness a person who himself heard the Tomblin and Browning testimony. A

U. S. 400 (1965); *Barber* v. *Page*, 390 U. S. 719 (1968); *Bruton* v. *United States*, 391 U. S. 123 (1968).

Since these prior statements were not hearsay, the jury did not have to make a preliminary finding that the conspiracy charged under § 241 was still in progress before it could consider them as evidence against the other defendants. The prior testimony was accordingly admissible simply if relevant in some way to prove the conspiracy charged. See *Lutwak* v. *United States*, 344 U. S., at 617.

As we read the record, there can be no doubt that the evidence of perjury by petitioners Tomblin and Browning in the election contest was relevant to make out the Government's case under § 241, even assuming, *arguendo*, that the petitioners' conspiracy ended, for purposes of federal jurisdiction, on May 27, 1970, with the certification of the federal election returns. For even if federal jurisdiction rested only on that aspect of the conspiracy involving the federal candidates, the proof at trial need not have been so limited. The prosecution was entitled to prove the underlying purpose and motive of the conspirators in order to convince the jury, beyond a reasonable doubt, that petitioners had in fact unlawfully conspired to cast false votes in the election. See *Lutwak* v. *United States*, *supra*, at 617. As it was never suggested that either Senator Byrd or Representative Hechler needed or sought the assistance of an unlawful conspiracy in order

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well-recognized exception to the hearsay rule, however, permits the introduction of certified court transcripts to prove the testimony given at a prior proceeding. See generally 5 J. Wigmore, *supra*, n. 7, at § 1681. Nor is there any right-of-confrontation problem here, since petitioners did not suggest below that the transcript read at the § 241 trial did not accurately reflect the testimony actually given at the election contest hearing.

to win his respective nomination, a key issue in this prosecution, accepting for the sake of argument petitioners' view of § 241, was whether and why petitioners conspired to have false votes cast for these federal candidates. The fact that two of the petitioners perjured themselves at an election contest in which the Mount Logan votes for Hager were at stake helped prove the underlying motive of the conspiracy, by demonstrating that the false votes for federal officers were not an end in themselves, but rather part of a conspiracy to obtain Hager's nomination through unlawful means. The jury could have inferred that the petitioners were motivated in casting false federal ballots by the need to conceal the fraudulent votes for Hager, since the casting of large numbers of false ballots for County Commissioner would likely have aroused suspicion in the absence of the casting of a similar number of false votes for the other offices at issue in the election.

Even if the federal conspiracy ended on May 27, then, the Tomblin and Browning election contest testimony was relevant to prove the offense charged. Accordingly, in order to rule on petitioners' challenge to the admissibility of this evidence, there was no need for the Court of Appeals, and there is no need for us, to decide whether petitioners' conspiracy ended on May 27 for purposes of federal jurisdiction or whether § 241 applies to conspiracies to cast fraudulent votes in local elections.

II

Petitioners argue, however, that the evidence at trial was insufficient to show that they had engaged in a conspiracy to cast false votes for the federal officers and that their convictions under § 241 can stand only if we hold that section applicable to a conspiracy to cast false votes

in a local election.[12] Our examination of the record leads us to conclude otherwise.

Two principles form the backdrop for our analysis of the record. It is established that since the gravamen of the offense under § 241 is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question. See *United States* v. *Guest*, 383 U. S. 745, 753–754 (1966); *Screws* v. *United States*, 325 U. S. 91 (1945). Moreover,

[12] In briefing this case, all parties appear to have assumed that this sufficiency-of-the-evidence claim was properly before this Court. It seems clear, however, that this issue was presented neither to the Court of Appeals nor to us in the petition for a writ of certiorari. As indicated earlier, the § 241 question arose below only with respect to the admissibility of the prior testimony of Browning and Tomblin, and not in connection with any claim that the evidence was insufficient to support a verdict under the statute. We nevertheless consider the sufficiency-of-the-evidence claim here. We recognize that petitioners did raise before both the District Court and the Court of Appeals, and in the petition for a writ of certiorari a claim that the indictment was unconstitutionally vague, and the gist of their argument on this point was that the Government had charged a conspiracy to cast false votes for both federal and local candidates in order to survive a motion to dismiss the indictment, but had turned around at trial and proved only a conspiracy to cast false votes for the local candidates. This argument therefore raised the substance of petitioners' present contention that the evidence was insufficient to show a conspiracy to cast false votes for federal candidates. Moreover, as we have had occasion to note, a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones. See, *e. g.*, *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Johnson* v. *Florida*, 391 U. S. 596 (1968). See also *Adderley* v. *Florida*, 385 U. S. 39, 44 (1966). Accordingly, even though the sufficiency-of-the-evidence issue was not raised below with any particularity, we think the interests of justice require its consideration here. See *Screws* v. *United States*, 325 U. S. 91, 107 (1945) (opinion of Douglas, J.). Cf. *Lawn* v. *United States*, 355 U. S. 339, 362 n. 16 (1958).

we scrutinize the record for evidence of such intent with special care in a conspiracy case for, as we have indicated in a related context, "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943). See also *Ingram* v. *United States*, 360 U. S. 672, 680 (1959).

Even with these caveats in mind, we find the record amply bears out the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for the federal officers. The Government's chief witness was Cecil Elswick, an unindicted coconspirator who served as the Republican election officer at the Mount Gay precinct and who actually cast most of the fraudulent votes. Elswick testified that he was first approached by petitioner Red Hager, the son of Okey Hager, who told Elswick to go along with them to win the Mount Gay precinct or else Hager would cause him trouble. When asked on direct examination for whom he was told to win the precinct, Elswick testified: "For the Okey Hager slate and Senator Byrd and Ken Hechler." App. 40. When Elswick expressed an interest in going along, Hager arranged for a meeting between Elswick and Tomblin at which Tomblin confirmed an offer of a part-time deputy sheriff job for Elswick as a reward for his help in the election fraud. Elswick later met with petitioner W. Bernard Smith in Tomblin's office, and Smith then instructed him on how to proceed to win the election. The night before the election, Elswick met with all five of the petitioners. At this meeting cash payments for the false votes were discussed and petitioners Smith and Hager emphasized the need for putting "all the votes" on the machine. Later that evening, Elswick accompanied Tomblin to visit Garrett

Sullins, a candidate for justice of the peace listed on the Hager slate. Tomblin told Sullins not to worry about his election because they had him "slated," so long as Sullins' wife, another Mount Gay precinct election official, would go along with the illegal voting.

Elswick then testified as to how he actually put the fraudulent votes on the machines. When a voter came into the precinct and asked for help in using the machines to vote the Neal Scaggs slate, Elswick and Mrs. Sullins would join the voter in the voting machine and, aligning their bodies so as to conceal what they were doing, would put votes on the machine for the entire Hager slate. In addition, Elswick simply went into the voting machine on his own and cast many fictitious ballots. Through a comparison between the reported returns and the number of persons who actually voted, false votes were shown to have been cast for every office—federal, state, and local. See n. 3, *supra*.

We think this evidence amply supported the jury's conclusion that each of the petitioners knowingly participated in a conspiracy which contemplated the casting of false votes for all offices at issue in the election. The evidence at trial tended to show a single conspiracy, the primary objective of which was to have false votes cast for Hager but which also encompassed the casting of false votes for candidates for all other offices, including Senator Byrd and Representative Hechler. True, there was little discussion among the conspirators of the federal votes *per se*, just as there was little discussion of the Hager votes in and of themselves, but the jury could believe this was only a reflection of the conspirators' underlying assumption that false votes would have to be cast for entire slates of candidates in order to have their fraud go undetected.

In our view, petitioners err in seeking to attach significance to the fact that the primary motive behind their

conspiracy was to affect the result in the local rather than the federal election. A single conspiracy may have several purposes, but if one of them—whether primary or secondary—be the violation of a federal law, the conspiracy is unlawful under federal law. See *Ingram* v. *United States*, 360 U. S., at 679–680. It has long been settled that § 241 embraces a conspiracy to stuff the ballot box at an election for federal officers, and thereby to dilute the value of votes of qualified voters; see *United States* v. *Saylor*, 322 U. S. 385 (1944). See also *United States* v. *Mosley*, 238 U. S. 383 (1915). This applies to primary as well as general elections. See *United States* v. *Classic*, 313 U. S. 299 (1941).

That petitioners may have had no purpose to change the outcome of the federal election is irrelevant. The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots. See *United States* v. *Saylor*, *supra*, at 386. As one court has stated:

> "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Prichard* v. *United States*, 181 F.

2d 326, 331 (CA6), aff'd due to absence of quorum, 339 U. S. 974 (1950).

Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes. And, whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of § 241.[13]

While the District Court's jury instructions did not specifically focus upon the conspiracy to cast false votes for candidates for *federal* offices, no objection was made at trial or before the Court of Appeals with respect to this aspect of the instructions. See *Johnson* v. *United States*, 318 U. S. 189, 200 (1943); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147 n. 2 (1970). And, even assuming,

[13] We also find no merit in petitioners' contention that the indictment was unconstitutionally vague. The indictment states that on May 12, 1970, a primary election was held in Logan County, West Virginia, for the purpose of nominating candidates for the offices of United States Senator, Representative to Congress, and various state and county public offices. It then charges each of the defendants with conspiring to injure and oppress the qualified voters of Mount Gay precinct in the free exercise and enjoyment of their "right to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect . . . ." The indictment further specifies that it was a part of the conspiracy "to cause fraudulent and fictitious votes to be cast in said precinct . . . ." Pet. for Cert. 3b. We think it plain that the indictment gave petitioners adequate notice of the specific charges against them. We also note, and petitioners themselves concede, that the form of the indictment was similar to those used in other § 241 prosecutions. See *United States* v. *Saylor*, 322 U. S. 385 (1944); *United States* v. *Kantor*, 78 F. 2d 710 (CA2 1935); *Walker* v. *United States*, 93 F. 2d 383 (CA8 1937); *Ledford* v. *United States*, 155 F. 2d 574 (CA6), cert. denied, 329 U. S. 733 (1946).

arguendo, that § 241 is limited to conspiracies to cast false votes for candidates for federal offices, we could find no plain error here. The prosecution's case, as indicated earlier, showed a single conspiracy to cast entire slates of false votes. The defense consisted in large part of a challenge to the credibility of the Government's witnesses, primarily the three unindicted coconspirators. The case therefore ultimately hinged on whether the jury would believe or disbelieve their testimony. Given the record, we think it inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well.

This case is therefore an inappropriate vehicle for us to decide whether a conspiracy to cast false votes for candidates for state or local office, as opposed to candidates for federal office, is unlawful under § 241, and we intimate no views on that question.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioners were convicted under 18 U. S. C. § 241, which imposes criminal penalties when "two or more persons conspire to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . ." The Court of Appeals affirmed, 481 F. 2d 685, and this Court granted certiorari to consider whether a conspiracy to cast fraudulent votes in a state election, without any evidence of racial discrimination, could constitute a federal offense under § 241. The Court of Appeals reached the substance of this question, holding that the Federal Government had the power under § 241 to punish not only conspiracies to poison federal elections, but also conspiracies in which state officials took

part to cast false votes in a state or local election. 481 F. 2d, at 698–700. The Court today avoids the issue squarely presented by petitioners and by the decision of the Court of Appeals, concluding that it need not reach the issue because the evidence "bears out the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for . . . federal officers."

After reviewing the record, I am left with the conviction that the Court, in affirming on the theory that petitioners agreed as a part of their conspiracy to have false votes cast for federal candidates, is convicting the petitioners for an offense for which they were not found guilty by the jury. The instructions to the jury were phrased in a fashion which did not require it to find intent to have false votes cast for federal candidates, so that there is in truth no "verdict" to that effect. The evidence of intent to have false votes cast for federal candidates is hardly conclusive, so that the failure of the charge to require such a finding could not be deemed harmless error. Fed. Rule Crim. Proc. 52 (a).

Because it is not clear that petitioners intended that fraudulent votes be cast for federal candidates, and because I believe that § 241 does not reach conspiracies to abscond with state elections, absent the element of racial discrimination, I dissent. The jury instructions, in allowing the jury to convict without finding a conspiracy to interfere with the federal electoral process, were improper, and the error was not harmless.

I

On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate and House of Representatives and for various state and local offices, including that of County Commissioner for Logan County. The incumbent Com-

missioner, Okey Hager, and his challenger, Neal Scaggs, were engaged in a bitter contest for the Democratic nomination for Commissioner. The petitioners, including Okey Hager's son Red Hager, induced election officials, including Cecil Elswick, who later testified for the Government at this trial, to cast false votes for the Okey Hager slate on the voting machines in the Mount Gay, West Virginia, precinct. There is no evidence that the Okey Hager slate included any nominees for federal offices. As the Court acknowledges, "it is apparent from the record that the primary purpose behind the casting of false votes was to secure the nomination of Hager for the office of County Commissioner." The Court nonetheless finds that the conspiracy necessarily encompassed an agreement to cast fraudulent ballots for the federal offices.

As the Court notes, a stringent scienter requirement has been imposed when the Government seeks to prosecute under § 241, requiring proof of "specific intent" on the part of a conspirator to interfere with a right protected by § 241.[1] This standard has required proof that a conspirator acted "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite," [2] in this case, the right to have votes cast in a *federal* election counted without impairment by fraudulent votes. It is against this exacting standard of *specific intent* that the actions of each of the conspirators in this case must be measured.

From the first, the prosecution in this case proceeded on the theory that casting false votes for state offices

[1] See *United States* v. *Guest*, 383 U. S. 745, 753–754; *id.*, at 785–786 (BRENNAN, J., concurring and dissenting); *United States* v. *Price*, 383 U. S. 787, 806 n. 20; *United States* v. *Williams*, 341 U. S. 70, 93–95 (DOUGLAS, J., dissenting); *Screws* v. *United States*, 325 U. S. 91, 101–107 (opinion of DOUGLAS, J.).

[2] *Id.*, at 105; see *United States* v. *Price*, *supra*, at 806 n. 20.

would constitute a violation of § 241. The indictment charged that on May 12, 1970, an election was held at Mount Gay to nominate candidates for the offices of United States Senator, Representative to Congress, and various state and county positions. It was charged that the petitioners willfully and knowingly conspired to injure voters in the exercise of their constitutional rights by impairing their right to vote for candidates "for the aforesaid offices" and to have such votes cast and certified at their full value. Thus the indictment charged a conspiracy in violation of § 241 without distinction between state and federal offices. Efforts on the part of the petitioners to clarify the charges against them were futile. The trial judge denied a motion to dismiss, which argued that the indictment failed to adequately particularize the alleged criminal violation. The petitioners also filed a motion for a bill of particulars which requested an elucidation of the specific acts which formed the basis of the indictment. This motion was also denied, and the case proceeded to trial with an indictment charging, as a federal crime, conspiracy to impair votes for not only federal, but also state offices.

The case was tried on the theory that petitioners conspired to secure the nomination of Okey Hager for County Commissioner. There was substantial evidence on the record to demonstrate the existence of this conspiracy, and petitioners necessarily contemplated having false votes cast in the local election to secure Okey Hager's nomination. There was also evidence that Cecil Elswick and others who were at the polling place during the election did in fact cast false votes for federal candidates. There is also evidence that one of the petitioners, Red Hager, did tell Elswick to cast false votes not only for Okey Hager, but also for Senator Byrd and Representative Hechler, candidates running for federal offices. But there

is no conclusive evidence in nearly 2,000 pages of transcript that any of the other four petitioners agreed, either with Elswick or with each other, to cast fraudulent votes for the federal candidates.[3]

The prosecution made clear in its closing argument to the jury that the essence of its case was the conspiracy to cast false votes for the local office of County Commissioner. It carefully focused the jury's attention on the fraud committed by the petitioners as regards the state election:

> "I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes cast and got the votes counted in the long drawn-out procedure that was involved over there."

In its charge to the jury, the trial court reinforced this crucial error. In its instructions, reprinted in rele-

[3] Cecil Elswick, an unindicted coconspirator who was a witness for the Government, testified that Barnard Smith told him "how to win the election," but there is no evidence that Smith made any reference to casting false ballots for federal candidates.

Elswick also testified that there was a meeting the night before the election at which all of the petitioners were present and at which, the Court notes, Smith and "Red" Hager emphasized the need to put "all the votes" on the machine. The entire statement indicates that Hager and Smith were simply urging Elswick to cast as many votes as could be cast in the precinct, given the number of registered voters; it does not constitute an instruction to cast votes for federal candidates as well as the Okey Hager slate:

"Bernard and Red Hager was mostly spokesmen and Bernard said to be sure and put all the votes on there, put all of them on but fifty, and Red kept saying, 'Put them all on.'" Tr. 632.

vant part in the Appendix to this opinion, the Court never required the jury to find a specific intent to have false votes cast in the *federal* election contests on the part of each of the conspirators. Throughout its instructions to the jury, the District Court reiterated that the crucial element of the charged crime under § 241 was a conspiracy to "injure and oppress . . . voters . . . in the . . . enjoyment of . . . the right to vote and to have such votes cast, counted, recorded, and certified at full value." It stated:

> "You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of [18 U. S. C. § 241].
>
> . . . . . .
>
> ". . . [I]f any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment."

At no time was the jury told that specific intent to have false votes cast for the *federal* candidates was necessary for conviction of each of the conspirators; it was enough that the "right to vote" was diluted and that "illegal ballots" were cast to injure "voting rights," without distinction between federal and state elections. As long as the jury accepted the credibility of the prosecution witnesses, conviction under these instructions was inevitable, even for those petitioners who were not shown by any

conclusive evidence to have had specific intent to interfere with the federal election, the ground on which the Court affirms.

While trial counsel did not object to the form of the instructions, where an error is so fundamental that it does not properly submit to the jury the essential elements of the charged offense, there is plain error and the interests of justice and fair play demand that we take note. See *Fisher* v. *United States*, 328 U. S. 463, 467–468; *Screws* v. *United States*, 325 U. S. 91, 107 (opinion of DOUGLAS, J.); Fed. Rule Crim. Proc. 52 (b).

The Court concedes that the jury instructions "did not specifically focus" on an intent to cast false votes for federal candidates, but avoids this problem by contending in effect that this error was harmless because "we think it *inconceivable* that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well." (Emphasis added.)

I cannot agree with this crucial assumption. The gravamen of a conspiracy charge is agreeing with the intent of achieving a certain proscribed objective. "[I]t is . . . essential to determine what kind of agreement or understanding existed as to *each* defendant." *United States* v. *Borelli*, 336 F. 2d 376, 384 (Friendly, J.) (emphasis added); see Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 929–930. When it is not shown that the unlawful objectives of one individual have been adopted by another, the latter cannot be found to have agreed to achieve the objectives and a conspiracy count to do so cannot be sustained. See *Yates* v. *United States*, 354 U. S. 298, 329–331.

The evidence in this case, as the prosecutor observed in closing argument, demonstrated that petitioners focused

their attention on the contest for County Commissioner. There is no conclusive evidence that the casting of fraudulent federal ballots was in fact necessary to petitioners' scheme to abscond with the local nomination contest, or that petitioners thought it necessary. There is no proof that a lower quantum of votes for the federal candidates would have aroused suspicion, or that petitioners felt that it would.[4] Ballot splitting, with disparate numbers of votes cast for the various offices, was prevalent at this election.[5] The nominations for County Commissioner and other local offices were closely contested, while the federal nominations were not, so that there would naturally be more votes cast in the local races.[6] And even if we assume that a sophisticated conspirator would have considered it necessary to stuff the federal ballot box in order to conceal fraud in the state election, we simply cannot presume that the petitioners did also. The record reveals an unsophisticated, bludgeonlike effort to win the election for Okey Hager, with minimal preliminary attention to the niceties of covering up the fraud. When there is no conclusive evidence that the need to cast fraudulent federal votes even crossed the minds of four of the five petitioners,

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[4] See n. 3, *supra*.

[5] For example, 375 votes were recorded in the Mount Gay precinct for County Commissioner (long term), 371 for justice of the peace and constable, but only 348 for United States Senator and 328 for United States Representative.

[6] The countywide totals in the Hager-Scaggs County Commissioner's race had Hager the winner by only 21 votes, and the result would have been reversed without the returns from Mount Gay. On the federal level, Senator Byrd and Representative Hechler were apparently running virtually unopposed for renomination. In Mount Gay, supporters of both Hager and Scaggs voted for these two federal incumbents, and Byrd won Mount Gay by a vote of 346 to six and Hechler by a vote of 318 to 10.

it is the jury's province to determine whether there was specific intent to cast such votes, not ours.

The slenderness of the reed on which the Court's affirmance of these convictions rests is demonstrated by its assertions that the jury "could believe" that the lack of discussion of federal ballots only reflected an "assumption" by petitioners that such ballots would have to be cast, and that the jury "could have inferred" that petitioners were motivated by the need to cast false federal ballots to conceal fraudulent local votes. But whether the jury "could have inferred" or "could [have] believe[d]" that there was sufficient proof of specific intent to cast false federal ballots in the evidence in this case misses the point, because the jury was never required to make this finding in order to convict. The jury verdict is not to be accorded its traditional sanctity, when it is premised on erroneous instructions. See *Burton* v. *United States*, 202 U. S. 344, 373–374. The jury has never passed on the question of petitioners' intent while guided by proper instructions. While circumstantial evidence may lead a jury to infer specific intent to interfere with a right protected by § 241, the weighing of the evidence should be the jury's task, not that of this Court. There was in fact no "verdict" that petitioners conspired to have false votes cast in the federal election, and the sparse circumstantial evidence in this case makes it impossible for me to conclude, as does the Court, that such a verdict was inevitable so that the error in jury instructions was harmless. At the very least, justice requires that this case be remanded for a new trial.

II

Because I cannot agree that the evidence showed that petitioners necessarily conspired with the specific intent of having false votes cast for federal candidates, I could

affirm only if § 241 reached a conspiracy by local officials to cast fraudulent votes in nominating candidates for local offices where, as here, there was no evidence of racial discrimination. I do not, however, believe that § 241 can properly be construed in such a fashion.

The Court of Appeals determined that § 241 did reach such conspiracies. It noted that the language of the section sweeps broadly to guarantee " 'any right or privilege secured . . . by the Constitution or laws of the United States,' " 481 F. 2d, at 699, and also that *United States* v. *Guest*, 383 U. S. 745, and *United States* v. *Price*, 383 U. S. 787, stated that § 241 proscribed conspiracies to violate Fourteenth Amendment rights, including those protected from interference under color of law by the Equal Protection Clause. One such right only recently defined, reasoned the Court of Appeals, is the right not to have valid votes cast in state elections diluted by those acting under color of state law, including local election officials such as those involved in the instant conspiracy, citing *Reynolds* v. *Sims*, 377 U. S. 533. Thus in the view of the Court of Appeals, a conspiracy to cast fraudulent ballots in which state election officials took part resulted in a denial of equal protection under color of state law and stated a crime under § 241, even if the conspiracy did not encompass a federal election. 481 F. 2d, at 698–700.

The argument ignores the intent of Congress as manifested by the legislative history of § 241. Congress did not intend to reach local election malfeasance where there was no evidence of racial bias because it did not believe that it had that power. It expressed unwillingness to interfere with the right of States to control their own elections where there was no racial discrimination.

Section 241 was originally passed as § 6 of the Enforcement Act of 1870, 16 Stat. 141. The Enforcement Act was a comprehensive body of legislation passed two

months after the ratification of the Fifteenth Amendment, which protected the right of citizens to vote from denial by the federal or state governments "on account of race, color, or previous condition of servitude." The Fifteenth Amendment authorized Congress "to enforce this article by appropriate legislation." This latter clause was the impetus for the Act.

What is now § 241 was offered as an amendment by Senator Pool of North Carolina, who referred in introducing the amendment to "rights which are conferred upon the citizen by the fourteenth amendment." Cong. Globe, 41st Cong., 2d Sess., 3611. But there is no proof that he conceived of the possibility that the amendment could reach local election fraud where there was no racial discrimination.[7] On the other hand, the rest of the legislative history of the Enforcement Act demonstrates that Congress, in adopting Pool's amendment, could not have intended to reach such frauds, because it did not believe that it had that power.

Because the Enforcement Act of 1870 was concerned primarily with suffrage, there is ample legislative history elucidating the reach of congressional power regarding both federal and local elections. The constitutional power to pass those sections of the Act which purported to deal with the right to vote in local elections was perceived to flow from the Fifteenth Amendment,[8] which protected the right to vote from infringement only "on account of race, color, or previous condition of servitude." Even the staunchest supporters of the Act conceded that, absent the critical element of racial discrimination, the Act could not reach local elections. The following collo-

[7] Senator Pool's remarks are reprinted in full in the appendix to *United States* v. *Price*, 383 U. S., at 807–820.

[8] See, *e. g.*, Cong. Globe, 41st Cong., 2d Sess., 3503 (Rep. Bingham); *id.*, at 3559 (Sen. Stewart); *id.*, at 3564 (Sen. Pool); *id.*, at 3567 (Sen. Stockton).

quy, for example, occurred between Senator Edmunds of Vermont, one of two Senate floor managers of the Act, *id.*, at 3753, and Senator Morton of Indiana, another supporter of the Act. While interference with local elections could be punished if racial discrimination, against either white or black, was extant, local election fraud could not otherwise be reached by federal jurisdiction:

> "Mr. MORTON. . . . Our theory is that the question of suffrage is under the control of the States, and was left to the several States by the Constitution of the United States; and that being the case, Congress had no power to pass a law conferring suffrage on colored men, and it was necessary to amend the Constitution of the United States for that purpose. We therefore provided in the fifteenth amendment that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The proposition to which I call attention is this: that the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suffrage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.
>
> "The question now to which I call the attention of the Senate is whether it is in the power of Congress to make provision for punishing violations of the right of suffrage except those violations go to the question of color, race, or previous condition of servitude.
>
> "Mr. EDMUNDS. But it does not make any difference what the color is, black or white.

"Mr. MORTON. Not a bit. It does not make any difference which; but if a man is denied the right of suffrage because he is a white man, if any state shall assume to deny a man the right of suffrage because he is a white man, then we have a right to interfere; or if because he is a colored man, then we have a right to interfere. But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?

"Mr. EDMUNDS. Nobody, I think, would claim that we have. I should not say so." Cong. Globe, 41st Cong., 2d Sess., 3571.

In the course of debate, Senator Sherman of Ohio, another ardent advocate of the Act, proposed an amendment to add three sections to it. These sections, which were adopted with slight changes as §§ 19, 20, and 21, were designed to deal with frauds not involving racial discrimination, but only in *federal* elections. Senator Sherman's comments express the desire not to "invade the right of any state," *id.*, at 3664, to control its own elections and reflect the belief that an element of racial bias was considered a necessary precondition to congressional power to deal with state elections. Federal elections for Senators and Congressmen could be governed absent such bias, but only by virtue of the express authority of Art. I, § 4, of the Constitution.[9] In describing

[9] Article I, § 4, provides that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Sherman's amendment orig-

these amendments to the House after their adoption by the Senate, Representative Bingham of Ohio, the floor manager of the Act in the House, stated:

"The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as

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inally provided also for regulation of Presidential electors, but this provision was quickly deleted when it was pointed out that Congress was without constitutional power to include it. Cong. Globe, 41st Cong., 2d Sess., 3670.

In proposing the amendments, Sherman stated:

"[Senator Thurman] admits that Congress has a right by appropriate legislation to prevent any State from discriminating against a voter on account of his race, color, or previous condition of servitude. That is all, I believe, that is claimed by any one on this side of the Chamber as to the authority conferred by the fifteenth amendment. . . .

. . . . . .

"But, Mr. President, there is one other grievance that I feel ought to be dealt with at this moment, as we have this bill before us; a grievance which has become of greater magnitude even than the denial of the right to vote to colored people: and that is, the open, glaring, admitted frauds by wholesale in the great cities of this country, by which our Government is about to be subverted. . . . We have official documents without number in both Houses of Congress showing the growing evil of trampling down the rights of communities and States to representation in Congress in the election of members of Congress and in the election of Senators. . . .

". . . There can be no doubt about the constitutional power of Congress in this particular, because it is in plain accordance with the provisions of the Constitution which authorize Congress to change and alter the mode and manner of electing members of Congress [Art. I, § 4] . . . . As I have said, they have received the sanction of a committee of the House, which has carefully examined the whole subject, and I do not believe they raise any constitutional question, or invade the right of any State.

. . . . . .

"In my judgment in elections for officers of the national Government we can prescribe, under the Constitution, the mode and manner and qualification of voters." *Id.*, at 3663–3664.

> I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress. They are expressly limited to elections of those officers. I do not deem it important to say anything further on that point." Cong. Globe, 41st Cong., 2d Sess., 3872.

Only nine months later, the same Congress which passed the Enforcement Act of 1870 passed the Force Act of 1871, 16 Stat. 433, which supplemented the 1870 Act by supplying independent federal enforcement machinery to affirmatively ensure the right to vote in all congressional elections. Federal election officials were appointed to supervise such elections; the normal state processes were suppressed. But Congress made clear that its power could attach only when needed to protect congressional elections. One of the supporters of the bill, Representative Churchill of New York, stated:

> "But, Mr. Speaker, for some years past grave doubts have prevailed in different portions of this country as to whether the declared results of elections have truly expressed the will of the people. With regard to officers of States and officers of minor communities this doubt, so far as it exists, is left to be determined, as it can only be determined, by the laws existing in those States or communities. But so far as regards members of the Congress of the United States, although the first legislation in regard to the matter is intrusted by the Constitution of the United States to the States themselves, the power is properly reserved to Congress itself to determine by what rules these elections shall be conducted . . . ." Cong. Globe, 41st Cong., 3d Sess., 1274.

In the same vein, Representative Bingham, who as noted was a floor manager of the 1870 Act, again reflected caution about interfering with the responsibility of the States to manage their own elections, asserting:

> "I am willing that the issue shall be made up, and let the people speak upon this question. The bill interferes with no reserved rights of the States. If the States do not choose to hold their elections on the same day for mere State officials, be it so; but with regard to the vote for Representatives in Congress, I take it that the great majority of the people of every State in the Union will admit that the nation has a right to be represented at every election for Congress by its own law and by its own officials as well as the State. I have given the words, the thoughtful words of the makers of the Constitution in support of that right. No law of any State by this bill is in any manner wrongfully impaired." *Id.*, at 1284.[10]

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[10] See also the remarks of Representative Lawrence of Ohio:

"Mr. LAWRENCE. . . . And if the States have failed to enact laws necessary to secure what we all, I trust, have so much at heart, to wit, the purity of the ballot-box, or have failed to execute those already enacted, then it is the highest duty of this Congress to intervene and protect the citizens of the United States in the enjoyment of the elective franchise against force and fraud in the election of Representatives in Congress, leaving the States to provide such legislation as they may deem necessary in the election of local and State officers.

. . . . .

"It will reach any officer who improperly tampers with the election of a Representative in Congress; but it does not reach any State officer or any citizen in connection with any local or State election.

. . . . .

"Mr. JONES, of Kentucky. I have not read all the provisions of this bill, and as the gentleman seems to have done so I desire to

Thus, while the concurrent nomination races for federal officers in the Mount Gay precinct provided an opportunity for petitioners to violate § 241, that violation could occur only if the petitioners possessed the specific intent to cast fraudulent votes in the federal elections as an object of their conspiracy.

The broad language of *Guest* and *Price* does not authorize us to draw any other conclusion. *Guest* involved racial discrimination and rights under the Equal Protection Clause "firmly and precisely established by a consistent line of decisions in this Court." 383 U. S., at 754. That is not true of the right to be free from fraud without any racial connotation in local elections. In *Price*, we noted the sparse legislative history of § 241 as part of the Enforcement Act, and held that there was no indication that Congress did not intend it to reach the Fourteenth Amendment right in question, the right to due process. 383 U. S., at 801. We noted that the application of § 241 in that case "does not raise fundamental questions of federal-state relationships." *Id.*, at 806. Those facts are not present in this case. There is legislative history which indicates that Congress did not intend to reach local election frauds in passing § 241, because it did not believe that it had that power. And the decision of the Court of Appeals reaches to the very heart of federal-state relations, permitting federal intrusion in even the most local election, intrusions which the 41st Congress attempted to avoid when passing the Enforcement Act of 1870 and the Force Act of 1871.

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ask him whether they apply to other elections than those for members of Congress?

"Mr. LAWRENCE. They apply only to the elections for Representatives and Delegates to Congress. The bill does not propose to interfere with State elections at all." Cong. Globe, 41st Cong., 3d Sess., 1276.

While the civil protections of the Fourteenth Amendment reach state elections even where there is no racial animus, criminal laws such as 18 U. S. C. § 241 must be strictly construed, and we have required that Congress "plainly and unmistakably" assert federal criminal jurisdiction over an activity. See *United States* v. *Bass*, 404 U. S. 336, 348; *United States* v. *Gradwell*, 243 U. S. 476, 485. Here Congress did not plainly intend § 241 to reach local elections frauds, and apparently intended quite the opposite. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States* v. *Bass*, *supra*, at 348.

I can affirm neither on the theory that § 241 reaches state election frauds where there is no evidence of racial discrimination, nor on the theory adopted by the Court that it was "inconceivable" that petitioners did not specifically intend to have false votes cast in the federal election, with the exception of Red Hager. The other petitioners are entitled at least to a new trial under proper instructions.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Excerpts from Jury Instructions

The indictment in this case charges in substance that beginning on or about the 1st day of May, 1970 and continuing until on or about the date of the indictment the defendants unlawfully, willfully and knowingly conspired with each other and with other persons who are both known and unknown to the grand jury, to injure and op-

press the qualified voters of Logan County in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and the laws of the United States, that is, the right to vote and to have such votes cast, counted, recorded and certified at full value.

The indictment also alleges that in order to effect the objects of the conspiracy the defendants caused and attempted to cause votes to be cast in the Mount Gay precinct of Logan County by procedures and methods in violation of the laws of the State of West Virginia, all with the purpose and intent that the illegal, fraudulent and fictitious ballots would be counted, returned and certified as a part of the total vote cast in the May 12, 1970 primary election, thereby impairing, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in that primary election in Logan County, which the indictment alleges violates Title 18 of the United States Code, Section 241.

The statute cited in the indictment provides in part that it shall be a criminal offense for two or more persons to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of the charging statute.

The indictment in this case states that the defendants caused false and fictitious votes to be cast and counted, and that casting and counting such votes violates the laws of the State of West Virginia. With regard to whether or not casting and counting false and fictitious votes or causing them to be cast and counted violates West Virginia law, you are further instructed that the laws of the

State of West Virginia are violated when fictitious votes are cast and counted or caused to be cast and counted.

The government in essence contends that these defendants, along with other co-conspirators not named as defendants in the indictment, including Elwood Sloan, Cecil Elswick, Calvin Napier, Mae Stollings, Minerva Richards, Janet Sullins and perhaps others, did unlawfully, willfully and knowingly conspire together and with each other to violate the law of the United States in causing or attempting to cause votes to be cast in the Mount Gay precinct of Logan County, West Virginia in the May 1970 primary election by procedures and methods in violation of the laws of West Virginia pertaining to the handling of a precinct by election officials, and by further causing and attempting to cause the County Court of Logan County, West Virginia, to find that no illegal votes were cast in the Mount Gay precinct by soliciting perjury and the commission of perjury in an election contest held subsequent to the May 12, 1970 primary, all with the purpose and intent that the alleged illegal and fraudulent and fictitious votes would be counted as a part of the total vote cast, resulting in an impairment, lessening and dilution of the value and effect of the votes legally and honestly cast. The government contends, of course, that all this was done in violation of Title 18, Section 241 of the United States Code, the charging statute designated in the indictment.

. . . . .

The Court further tells you that intent is an essential element of this offense. You are therefore charged that before you can convict the defendants, or any of them, you must believe beyond a reasonable doubt that such defendant or defendants deliberately and with knowledge conspired with others to injure certain qualified voters in the free exercise and enjoyment of their right of suffrage.

Now, it is a legal presumption that people intend the natural and probable consequences of their acts, and also that they know that the right of legally qualified persons to vote is a federally Constitutionally protected right, and consequently, if any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment.